

THE NEW POLITICS OF JUDICIAL ELECTIONS 2006

How 2006 Was the Most Threatening Year Yet to the Fairness and Impartiality of Our Courts—and How Americans are Fighting Back

by
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Justice at Stake
c a m p a i g n

About the Brennan Center For Justice

**BRENNAN
CENTER
FOR JUSTICE**

The Brennan Center is a public policy institute that works to strengthen democracy and secure justice through law, scholarship, education and advocacy. Through its Campaign Finance Reform and Fair Courts Projects, the Center has been seeking to reduce the influence of money on politics, including both judicial and non-judicial elections. Using television advertising data obtained from TNS Media Intelligence/CMAG, the Center's Research Associate Lauren Jones created a comprehensive database and produced the quantitative analyses presented in Part 1 of this report.

About the National Institute on Money in State Politics

The National Institute on Money in State Politics has been collecting, publishing, and analyzing data on money in state legislative and gubernatorial elections for more than 13 years. The Institute has also compiled a summary of state Supreme Court contribution data from 1989 through the present and has compiled complete detailed databases of campaign contributions for all high-court judicial races beginning with the 2000 elections. The analysis of candidate fundraising and spending in Part 2 of this report uses data compiled by the Institute.



About the Justice at Stake Campaign



The Justice at Stake Campaign is a nonpartisan national partnership working to keep our courts fair, impartial and independent. In states across America, Campaign partners work to protect our courts through public education, grass-roots organizing and reform. The Campaign provides strategic coordination and brings unique organizational, communications and research resources to the work of its partners and allies at the national, state and local levels. The Campaign's Lauren Nyren provided substantial research support for this report.

This report was prepared by the Justice at Stake Campaign and two of its partners, the Brennan Center for Justice and the National Institute on Money in State Politics. It represents their research and viewpoints, and does not necessarily reflect those of other Justice at Stake Campaign partners or their funders. Publication of this report was supported by grants from Carnegie Corporation of New York, the JEHT Foundation, the Joyce Foundation, the Moriah Fund, and the Open Society Institute.

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Executive Summary

This fourth edition of “The New Politics of Judicial Elections” shows how 2006 was the most threatening year yet to the fairness of America’s state courts. Special interest pressure is metastasizing into a permanent national campaign against impartial justice: High court elections featured broadcast television advertisements in more than 91 percent of states with contested campaigns, median candidate fundraising hit an all-time high, special interests began to pour money into lower court campaigns, and pushy questionnaires sought to make judges accountable to special interests instead of the law and the Constitution.

As we explain, defenders of fair and impartial courts are fighting back. More states are considering reforms to insulate their courts from special-interest excesses by reforming their judicial elections or advancing proposals to scrap them entirely. Many of America’s judges used the 2006 campaigns to stand up to special interest bullying tactics. Civic and legal organizations are stepping up their efforts to educate Americans about the threat to impartial justice. And when Americans understand the threat, they want to protect the courts that protect their rights: A series of ballot measures that sought to politicize the courts all met defeat at the hands of voters.

TV Ads Continue to Dominate Supreme Court Races

TV Ads Appear in 10 of 11 States. In 2006 television advertisements ran in 10 of 11 states with contested Supreme Court elections, compared to four of 18 states in 2000.

Average State Spending on TV Ads Sets Record. In 2006 average spending on TV airtime per state surpassed \$1.6 million, up from \$1.5 million two years ago.

Television Advertising in Primary Elections is Increasingly the Norm. In 2006 television ads appeared during primary elections in seven of the 10 states in which advertising occurred. Nearly one third of all spots throughout the campaign cycle were in primary campaigns, totaling more than \$4.6 million

Pro-Business Groups Dominate the Airwaves. Business and pro-Republican television advertisements dominated the airwaves in 2006. Pro-business groups were responsible for more than 90 percent of all spending on special interest television advertisements.

Candidates Go Negative. In 2006 the candidates themselves went on the attack, sponsoring 60 percent of all negative ads; two years earlier, they had sponsored only 10 percent of the attack ads, leaving the dirty work to interest groups and political parties.

Candidates Return to Traditional Themes—Sometimes. Slightly more than half of all television ads in 2006 had traditional themes—that is, they focused on the candidate’s qualifications, experience or temperament.

Changing Channels? The Power of Television Advertising Drops in 2006. The candidate with the most on-air support won 67 percent of the time, a modest drop from 85 percent in 2004.

The Judicial Money Chase Spreads to More States

2006 Brings the Priciest Race Ever to Five States. Of the 10 states that had entirely privately financed contested Supreme Court campaigns in 2006, five set fundraising records. Candidates in Alabama combined to raise \$13.4 million, smashing the previous state record by more than a million dollars.

Business Interests Donate Twice as Much as Lawyers. Donors from the business community gave \$15.3 million to high court candidates—more than twice the \$7.4 million given by attorneys.

Interest Groups Bring Their Checkbooks. Third-party interest groups pumped at least \$8.5 million more into independent expenditure campaigns to support or oppose their candidates. About \$2.7 million of that was spent in Washington state alone.

Big Money No Longer Guarantees Success at the Ballot Box. In 2006 the candidate raising more money won 68 percent of the time, down from 85 percent in 2004.

Watch Out Below! Big Money Seeps Down-Ballot. Trial lawyers and corporate interests in a southern Illinois race combined to give more than \$3.3 million to two candidates for a seat on the state court of appeals, quadrupling the state record. Madison County witnessed a \$500,000 trial court campaign, and a Missouri trial court judge was defeated after an out-of-state group poured \$175,000 into a campaign to defeat him.

When Judicial Candidates Speak Out, Who Wins?

Interest Groups Ratchet Up High-Pressure Questionnaires—But Many Judges Refuse to Play Along. Special interests tried to pressure candidates into making statements on the campaign trail that could appear to bias the judges before they take their seats on the bench. A backlash is underway, with many judges and judicial candidates refusing to be trapped by special interest questionnaires.

When Judicial Candidates Speak Out, Who Wins? In 2006 judicial candidates who sought to put disputed political and legal issues at the center of their candidacy lost more often than they won. In state after state, when judicial campaigns began to sound like politics as usual, many voters seemed wary.

Growing Interest in Reforms to Keep Courts Fair and Impartial

Public Financing of Judicial Campaigns. North Carolina's innovative approach to public campaign financing has been a success, and in April 2007 New Mexico passed legislation to become the second state to offer full public financing.

Defense of Merit Selection. In states that use merit selection and retention elections to choose high court judges, two Justice at Stake partners—the Committee for Economic Development and the American Judicature Society—have helped lead the fight to preserve the systems from special-interest and partisan attacks.

Defining Proper Judicial Accountability. The Institute for the Advancement of the American Legal System at the University of Denver recently released two publications that provide the tools to establish or improve judicial performance standards and metrics. If voters have access to the output of a comprehensive and fair evaluation process, everyone wins. And when voters better understand their judges' records, special interests will have less clout to distort them.

Moving Towards Merit Selection. Former Minnesota Governor Al Quie recently led a policy review commission examining how to protect the state's courts from growing special interest pressure. In early 2007, the "Quie Commission" released a report suggesting the state move to a modified "Missouri Plan" system of merit selection with retention elections.

Stronger Recusal Standards. In order to reduce the potential link between interest group pressure and case decisions, many observers believe that the time has come for judges to recuse themselves from at least some cases where contributors argue before them in court—or when campaign trail speech calls their impartiality into question.

Voters Reject Political Tampering with the Courts

Colorado: Amendment 40. Two sides combined to spend over \$2.5 million on a citizen ballot initiative that would have limited the number of terms that appellate judges can serve. The measure was defeated.

Hawaii: Measure 3. Voters rejected a constitutional amendment passed by the Democratic-controlled legislature to lift the mandatory retirement age of state judges in order to deny the Republican governor open slots to fill.

Montana: Constitutional Initiative 98. After a pervasive pattern of fraudulent signature gathering was found, a judicial recall measure was thrown off the Montana ballot.

Oregon: Constitutional Amendment 40. For the second time in four years, voters rejected a proposal to move from statewide to district-based judicial elections for their appellate courts.

South Dakota: Amendment E. By a landslide vote of 89-11, voters dealt a body blow to the "J.A.I.L. 4 JUDGES" movement that proposed to strip immunity from judges and other public officials.

TV Ads Continue to Dominate Supreme Court Races

Broadcast television advertising has rapidly become prominent in the vast majority of state Supreme Court elections.¹ Candidates and groups now almost invariably rely on the airwaves to boost—or bash—contenders for judicial office. Not surprisingly, candidates look to television ads to increase their name recognition to combat voter “roll-off” in judicial elections.² In an ideal world, television ads would help arm voters with information they can use to elect the most qualified, experienced judge. But in reality, television advertising is often used to misrepresent or distort facts, and mislead or scare voters.

Television Advertising Spreads — Since 2000, the percentage of state Supreme Court campaigns featuring television advertising has increased dramatically. That year, television advertisements ran in less than one quarter of states with contested Supreme Court elections. By 2006, television advertising ran in 91 percent of states with contested Supreme Court campaigns (all but Texas).

Business Groups Drown Out the Opposition — Special interest campaigns have often featured a battle between rival camps: business against labor, plaintiffs against business, pro-development against pro-conservation. But in 2006, interest group advertising overwhelmingly favored pro-business, pro-Republican interests: 85 percent of special interest television advertisements were sponsored by groups on the political right. In fact, nationwide, only two Democratic-leaning groups sponsored television advertising in Supreme Court elections.

Candidates Go Negative — Negative advertising in state Supreme Court campaigns by special interest groups in recent years appears to have paved the way for negative advertising by judicial candidates themselves. Whereas in 2004 special interest groups and political parties sponsored nearly nine of ten negative ads, candidates sponsored 60 percent of all negative ads in the 2006 cycle.

¹ The estimated costs of airtime in this report are supported by television advertising data from the nation's 100 largest media markets. The estimates were calculated and supplied by TNS Media Intelligence/CMAG. The calculations do not include either ad agency commission or the costs of production. The costs reported here therefore understate expenditures, and the estimates are useful principally for purposes of comparison within each state.

² Voters who select presidential, gubernatorial, congressional and even local candidates often fail to vote for Supreme Court candidates. A study of 478 state Supreme Court elections held between 1980 and 1994 in 35 states found that in some cases voter roll-off for Supreme Court elections was as high as 65 percent. (Melinda Gann Hall, Mobilizing Voters in State Supreme Court Elections: Competition and Other Contextual Forces as Democratic Incentives, Sixth Annual State Politics and Policy Conference, Texas Tech University, at <http://www.depts.ttu.edu/politicalscience/2006Conference/SPP/Mobilizing%20Voters%20in%20Supreme%20Court%20Elections.%20M%20Gann%20Hall.pdf>.)

**Percentage of States with Contested Supreme Court Elections
Featuring TV Advertising, 2000–2006**

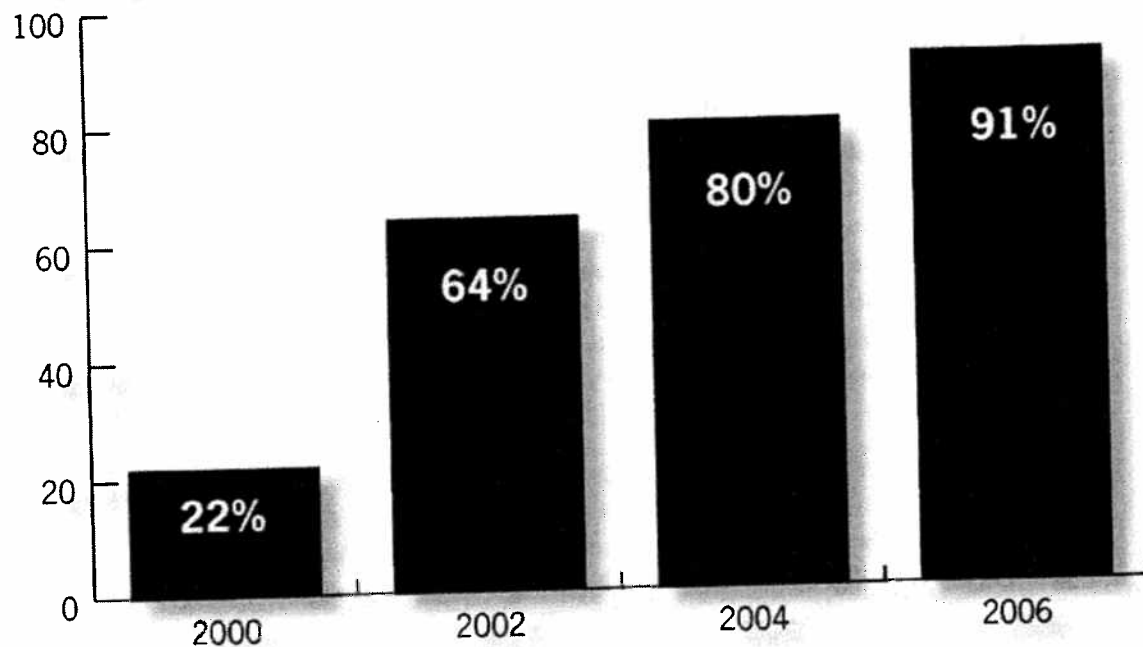


Figure 1.

**TV Ads Appear in Supreme Court Races in 10 of 11
States with Contested Elections**

In barely half a decade, TV ads have become the norm in Supreme Court races. Although there were contested Supreme Court elections in 18 states in 2000, television advertisements ran in only four. Two years later, television advertisements ran in nine of the 14 states with contested Supreme Court elections. By 2004 viewers in 16 of 20 states with contested Supreme Court elections witnessed television advertisements about high court candidates. In 2006 television advertisements ran in 10 of 11 states with contested Supreme Court elections. Of states with contested Supreme Court elections in 2006, only Texas lacked television advertising. Since our nationwide tracking of TV ads began in 2000, only two states with contested high court elections—Minnesota and North Dakota—have remained free of network television advertising.

Average State Spending on TV Ads Sets Record

In 2006 candidates, special interest groups, and political parties combined to spend almost \$16.1 million on television advertising in high court campaigns. In 2004 average spending per state on TV ads was a little over \$1.5 million. In 2006 average spending surpassed \$1.6 million. As Figure 2 illustrates, three states—Alabama, Georgia and Ohio—featured more than \$2 million in television advertising in 2006 Supreme Court races.

Airtime Summary, 2006 Supreme Court Elections

State	Candidate		Group		Party		Total	
	Airings	Cost	Airings	Cost	Airings	Cost	Airings	Cost
Alabama	15,760	\$5,310,330	2,070	\$993,080	0	\$0	17,830	\$6,303,410
Arkansas	84	\$49,125	0	\$0	0	\$0	84	\$49,125
Georgia	757	\$960,554	1,073	\$1,321,494	570	\$550,003	2,400	\$2,832,051
Kentucky	2,357	\$772,563	0	\$0	0	\$0	2,357	\$772,563
Michigan	83	\$97,871	551	\$709,058	0	\$0	634	\$806,929
Nevada	845	\$447,712	50	\$39,929	0	\$0	895	\$487,641
North Carolina	2,746	\$914,800	327	\$272,715	0	\$0	3,073	\$1,187,515
Ohio	4,260	\$1,196,718	1,220	\$799,396	283	\$94,986	5,763	\$2,091,100
Oregon	995	\$470,970	0	\$0	0	\$0	995	\$470,970
Washington	0	\$0	1,081	\$1,055,148	0	\$0	1,081	\$1,055,148
Total	27,887	\$10,220,643	6,372	\$5,190,820	853	\$644,989	35,112	\$16,056,452

Figure 2.

Voters are seeing an increasing number of ads as well (see Figure 4). In 2006 voters in seven states—Alabama, Georgia, Kentucky, Nevada, North Carolina, Oregon, and Washington—saw more total spots than ever before.



State in Focus: Alabama

On January 1, 2006 Alabama Supreme Court Justice Tom Parker publicly excoriated his fellow justices for following U.S. Supreme Court precedent and setting aside the death penalty for Renaldo Adams, a juvenile. Justice Parker had recused himself from the Adams case, because he had participated in Adams' prosecution. In an op-ed published in the *Birmingham News*, Parker stated that his "fellow Alabama justices freed Adams from death row not because of any error of our courts but because they chose to passively accommodate—rather than actively resist—the unconstitutional opinion of five liberal justices on the U.S. Supreme Court." Justice Parker's suggested defiance of U.S. Supreme Court precedent and his outspoken criticism of his fellow justices landed him in the national news and kick-started his campaign for chief justice.

With this controversy in the background, the Republican primary campaign for chief justice between Justice Parker and incumbent Chief Justice Drayton Nabers proved extremely contentious. Justice Parker ran one television ad that featured a hand holding a knife and a voiceover that said, "Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court using a 5 to 4 decision based on foreign law and unratified UN treaties."



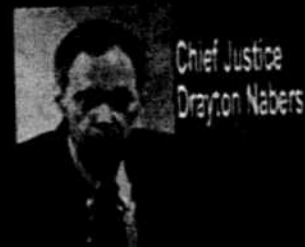
[Announcer]: Nine years ago a vicious thug raped and repeatedly stabbed a pregnant woman leaving her and her



unborn child to die. Convicted of rape and murder Renaldo Adams was sentenced to



death, but now Adams is off death row thanks to Chief Justice



Drayton Nabers and the Alabama Supreme Court using a 5 to 4 decision

Figure 3. Copyright 2006 TNS Media Intelligence/CMAG

Alabama viewers saw a staggering 17,830 spots in the 2006 high court campaigns—more than the total number of spots aired in the 2000, 2002 and 2004 Alabama campaigns combined—and the highest number of spots ever aired in one state's Supreme Court election cycle.

Records fell on the fundraising side, too: Sue Bell Cobb—the eventual victor—and Chief Justice Nabers engaged in a fundraising arms race in the general election. While he raised \$4,958,156 for the primary and general elections combined, she raised \$2,621,838 in the general alone. Combined with the \$618,962 raised by Parker, the campaign for the Alabama Chief Justice's seat totaled \$8.2 million, making that race the most expensive in state history, the most expensive campaign anywhere in the nation in 2006, and the second most expensive judicial race in American history.

Four other races for the state's highest court brought in \$5.2 million in campaign donations. The sum total for all the races—\$13.4 million—set a state record for aggregate high court fundraising. Since 1993, candidates for the Alabama Supreme Court have raised \$54 million.

Based on Foreign Law

based on foreign law and unratified UN treaties.

Justice Tom Parker

Parker: "Alabama courts need to stand up for American Law not foreign law."

Justice Tom Parker

Some things are worth fighting for.

Announcer: Tom Parker for Chief Justice. Fair, balanced, unafraid.

Tom PARKER

For Chief Justice

Fair, Balanced, Unafraid

Parker for Chief Justice

Television Advertising in Primary Elections Is Increasingly the Norm

In 2006 television ads appeared during primary elections in seven of the 10 states in which advertising occurred. Nationwide, nearly one third of all spots throughout the campaign cycle ran in primary campaigns, totaling more than \$4.6 million. That slightly eclipses the \$4.3 million spent on primary advertising in 2004, and is almost 48 times the \$96,000 spent airing primary TV ads in 2002.

Of the 10 states with television advertising in 2006, seven (Arkansas, Georgia, Kentucky, Nevada, North Carolina, Oregon, and Washington) hold nonpartisan elections.³ But 71 percent of all of those primary election spots ran in Alabama, one of a handful of states with partisan elections.

Number of Television Ad Airings by State and Election Cycle, 2000–2006

	AL	AR	GA	ID	IL	KY	LA	MI	MS	NV	NM
2000	4,758	0	U	0	0	0	0	5,763	218	0	U
2002	3,594	U	0	133	1,473	U	U	1,030	1,479	233	0
2004	9,377	242	453	U	7,500	205	315	1,512	1,479	867	326
2006	17,830	84	2,400	U	N/A	2,357	U	634	N/A	895	N/A
Total	35,559	326	2,853	133	8,973	2,562	315	8,939	3,176	1,995	326

Figure 4. A U indicates uncontested elections. N/A indicates there were no open judicial seats.⁴

³ Although party affiliations are not listed on the ballot in general elections in Michigan or Ohio, we classify them as partisan contests for purposes of analysis. In Michigan candidates are nominated in political party conventions and in Ohio justices run in partisan primary elections. In states with nonpartisan elections, the primary sometimes decides the winner outright. Other times, the primary serves the more traditional role of reducing the number of candidates on the general election ballot.

⁴ Data is gathered from the top 100 media markets nationally. TV airings data for Pennsylvania and Wisconsin, which hold odd-year elections, have not been analyzed over these four cycles. Data for Montana are unavailable because the state does not have a media market in the top 100. Minnesota and North Dakota have not yet seen broadcasting advertising in their high court campaigns. Accordingly they are not included in this chart.

Pro-Business Groups Dominate the Airwaves

Business and pro-Republican television advertisements dominated the airwaves in 2006. Pro-business groups were responsible for more than 90 percent of all spending on special interest television advertisements (accounting for 85 percent of interest groups spots). FAIRJUDGES.NET, a North Carolina 527 group backed by trial attorneys and major Democratic Party donors, and CITIZENS TO UPHOLD THE CONSTITUTION, a Washington state coalition of labor, environmental, tribal, and trial lawyers, were the only two progressive groups to advertise. In addition, one trial lawyer in Ohio, Michael Dyer, independently funded TV ads to support A.J. Wagner's campaign. The dominance of advertising by business groups has increased since 2000 (see Figure 5). Similarly, the Republican Party sponsored more than two-thirds of all party advertisements.

Whereas in 2004 special interest groups went head-to-head in four states, accounting for 90 percent of the special interest spending, in 2006 special interest groups only faced off against each other in Washington state (see Washington feature on pages 12–13).⁵ Television spending by interest groups in other states was literally entirely one-sided.

	NC	OH	OR	TX	WA	WV	Total
	0	11,907	0	0	0	0	22,646
	0	13,105	U	555	37	N/A	21,639
	284	14,139	181	0	273	5,096	42,249
	3,073	5,763	995	0	1,081	N/A	35,112
	3,357	44,914	1,176	555	1,391	5,096	121,646

⁵ The PARTNERSHIP FOR OHIO'S FUTURE—which shares a mailing address and has key overlapping staff members with the Ohio Chamber of Commerce—sponsored advertisements to support incumbent Justice Terrence O'Donnell and Robert Cupp. Trial lawyer Michael Dyer sponsored advertisements to support A.J. Wagner, who lost a Democratic primary.

Comparative Airtime Spending by Interest Groups, 2000–2006

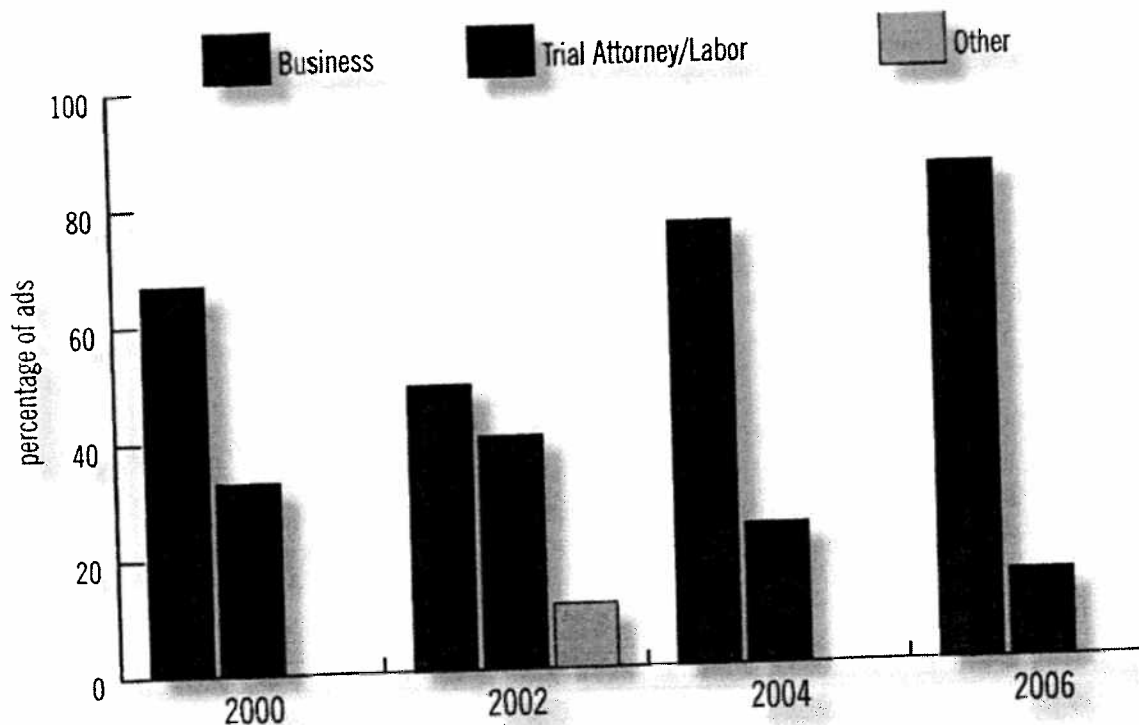


Figure 5.

Candidates Go Negative

Historically, special interest groups and political parties have proven to be the attack dogs of Supreme Court campaigns. In 2004 special interest groups and political parties sponsored almost nine out of ten negative ads. In 2006 however, it was the candidates themselves who went on the attack, sponsoring 60 percent of all negative ads.⁶ In Alabama, Georgia, and Nevada candidates hurled insults and accusations that would have been unbecoming even in congressional campaigns, much less in campaigns by individuals whose judicial temperament is an important qualification for office.

- In **Alabama** the campaign for Chief Justice turned extremely negative in the early days of a primary between the incumbent and his challenger, an associate justice on the court. An ad sponsored by challenger Justice Tom Parker featured an ominous photo of a hand holding a knife and newspaper headlines about a murder. Said the narrator, “Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama

⁶ In both 2006 and 2004, negative ads represented about 20 percent of the total ads aired.

Supreme Court.” Nabers countered with an ad that said, “Tom Parker doesn’t do his job. He wrote only one opinion for the court in his first year as a judge.”

- Nabers defeated Parker, but the general election campaign against Judge Sue Bell Cobb soon turned negative as well. Nabers ran ads accusing Cobb of being bankrolled by gambling bosses and trial lawyers. Cobb ran ads accusing Nabers of being in the pocket of oil and insurance companies.
- In **Georgia** Justice Carol Hunstein ran an ad that said, “Mike Wiggins was sued by his own mother for taking her money. He sued his only sister. She said he threatened to kill her while she was eight months pregnant. A judge ordered Wiggins never to have contact with her again.”
- THE SAFETY AND PROSPERITY COALITION simultaneously ran an ad accusing Hunstein of legislating from the bench. After characterizing several of her rulings, the ad said, “If liberal Carol Hunstein wants to make laws, she should run for the legislature instead of judge.”
- In **Nevada** Justice Nancy Becker ran an ad with her opponent’s picture and a voiceover that said, “First she took thousands in contributions from two convicted topless club owners. Then she slashed bail for gang bangers who brutalized an MGM employee.”

Candidates Return to Traditional Themes—Sometimes

Slightly more than half of all television ads in 2006 had traditional themes—that is, they focused on the candidate’s qualifications, experience or temperament. Nevertheless, family and conservative values continued to be a major point of emphasis. Almost 30 percent of TV ads nationwide mentioned family values, and 38 percent touted the candidate’s conservative values.

- In **Alabama** candidates competed for the badge of most conservative. One ad sponsored by Chief Justice Drayton Nabers said, “Drayton Nabers is a conservative leader, fighting for our values. A family man and the author of a book on the importance of biblical character.” Another ad said that Judge Sue Bell Cobb was “too liberal for Alabama.” Cobb, a Democrat, countered with an ad that lauded her work to defend abused children and imprison criminals. After each characteristic she defended, “That doesn’t make me liberal.”

Topics of Ads, 2006 Supreme Court Elections

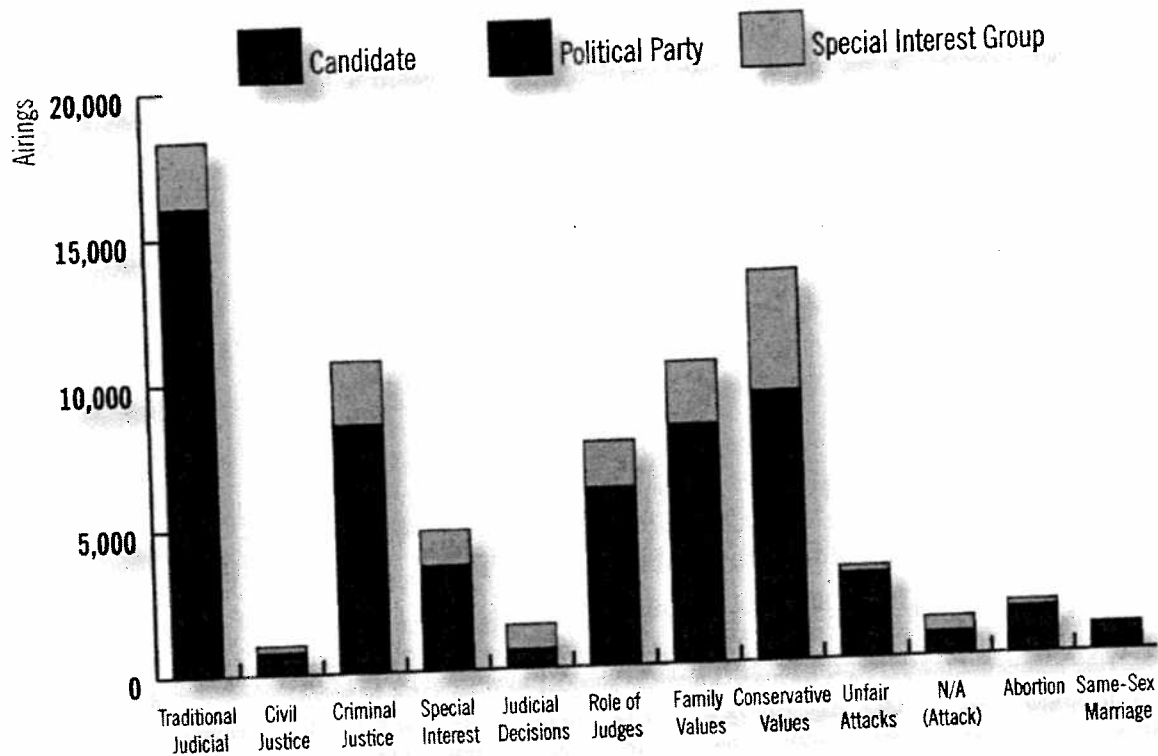


Figure 6.7

- In **Ohio** an ad sponsored by THE PARTNERSHIP FOR OHIO'S FUTURE—which shares a mailing address and has key overlapping staff members with the OHIO CHAMBER OF COMMERCE—said, “Bob Cupp is a man of principle who led the fight against liberal activists to preserve Ohio’s motto, “With God, all things are possible.”

Interestingly, ads arguing that small businesses and working people need a fair shot in the courtroom—one of the top three themes in 2004—virtually disappeared from the airwaves in 2006. But the role of judges re-emerged as a major issue. More than one in five ads nationwide discussed how judges should act while on the bench.

- In **North Carolina** an ad sponsored by Chief Justice Sarah Parker explained, “I believe a judge has the obligation to be hard working, fair minded, and willing to make tough decisions.”

⁷ Ads can address more than one topic. Ads coded as “Not Applicable” addressed issues irrelevant to the judiciary. For example, in Alabama Justice Tom Parker ran an ad that said, “Alabama taxes are the lowest in the country, and that’s no thanks to Drayton Nabers. Does anyone think he won’t force them higher if he wins a six-year term?”

With the influx of negative ads by candidates, perhaps it is unsurprising that nearly 10 percent of ads claimed that the candidate was being unfairly attacked by his or her opponent.

- In **Nevada** Nancy Saitta ran an ad that said, "I'm sick and tired of negative ads, aren't you? My opponent has chosen the words of a convicted felon to attack me. It might sell newspapers, but it's just not true."

Changing Channels?

The Power of Television Advertising Drops in 2006

In 2004, of the 34 races that featured TV ads, 29 were won by the candidate with the most on-air support—an 85 percent success rate. In 2006 the ad war winners won less frequently. In the 21 races featuring TV advertising, the candidate with the most on-air support still won 14 times, lowering the winning percentage to 67 percent. Business groups who advertised also saw their success rate drop. To be sure, pro-business special interest groups outspent progressive interest groups by more than nine-to-one on television advertising in Supreme Court elections in 2006. But only 71 percent of candidates for whom pro-business groups sponsored ads won a seat on the bench.⁸ All five candidates supported by television advertising by progressive groups won election.

The highest spending interest group, the SAFETY AND PROSPERITY COALITION—a Georgia group that received the majority of its funding from the AMERICAN JUSTICE PARTNERSHIP, an arm of the NATIONAL ASSOCIATION OF MANUFACTURERS—spent more than \$1.3 million on advertisements that supported Mike Wiggins and attacked his opponent, Justice Carol Hunstein. THE GEORGIA REPUBLICAN PARTY spent an additional \$550,003 to support Wiggins. Hunstein sponsored her own advertising, spending \$960,000. Because Hunstein's advertisements were paid for by her campaign, Georgia law limited contributions to \$5,000 each. Outside groups, like those supporting Wiggins, were not subject to similar limitations. Hunstein was re-elected. (See the Georgia profile on pages 22–23.)

Watch Supreme Court television ads at justiceatstake.org.



⁸ In North Carolina FAIRJUDGES.NET ran one advertisement supporting Sarah Parker, Mark Martin, Patricia Timmons-Goodson, and Robin Hudson. Mark Martin is a Republican; the other three are Democrats. All four candidates won election.

State in Focus: Washington

In Washington special interest groups were the only advertisers in the high court races, running fierce attacks against Chief Justice Gerry Alexander and challenger John Groen. Although only four unique ads ran in the primary and the airwaves were silent during the general election, the messages they sent provide a stark warning about what can happen when campaigns descend into mudslinging. On the right, two special interest groups portrayed 70-year-old Alexander as too old for the job, questioned his character, and implied that he would trample voters' property rights. Meanwhile, a group on the left accused Groen of pandering to far-right extremists.

One ad funded by IT'S TIME FOR A CHANGE, a political action committee affiliated with the BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, accused Alexander of inappropriately supporting Justice Bobbe J. Bridge after she was arrested for drunk driving. The implication was that Alexander was more interested in protecting a friend than in upholding justice.

Perhaps the most inflammatory advertisement in Washington state in 2006 was sponsored by AMERICANS TIRED OF LAWSUIT ABUSE, a national interest group based in Virginia, that featured a woman whose son was murdered saying, "The Andress decision let my son's killer walk free. . . if Justice Alexander hadn't voted for this

Percentage of Ads Sponsored by Interest Groups in 2006 Supreme Court Elections, by State

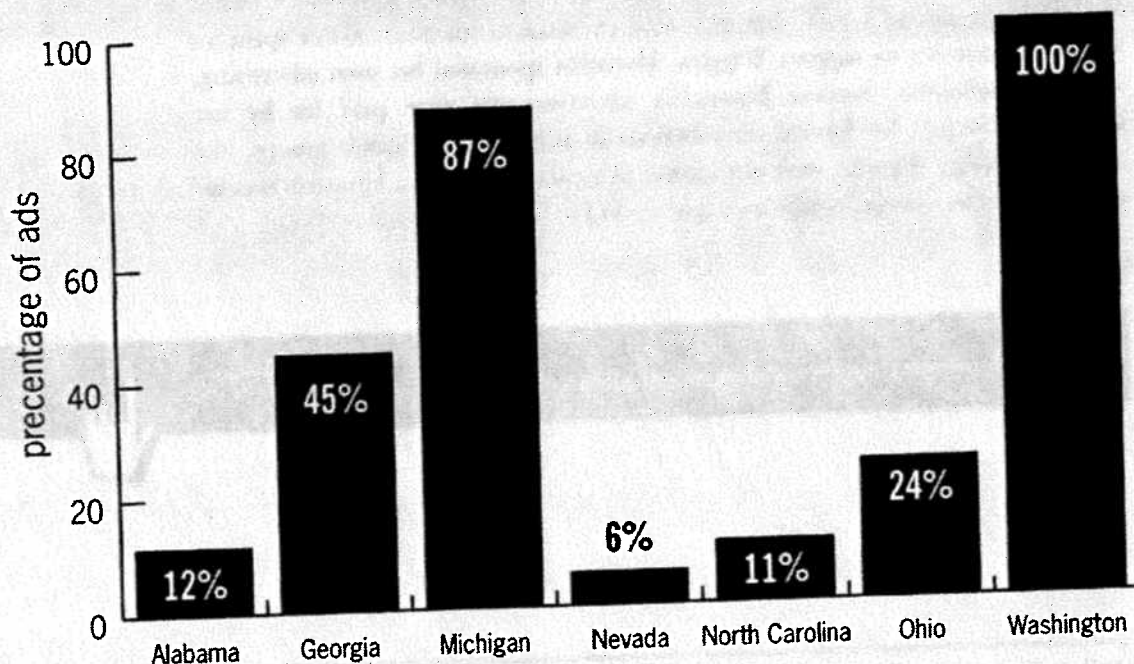
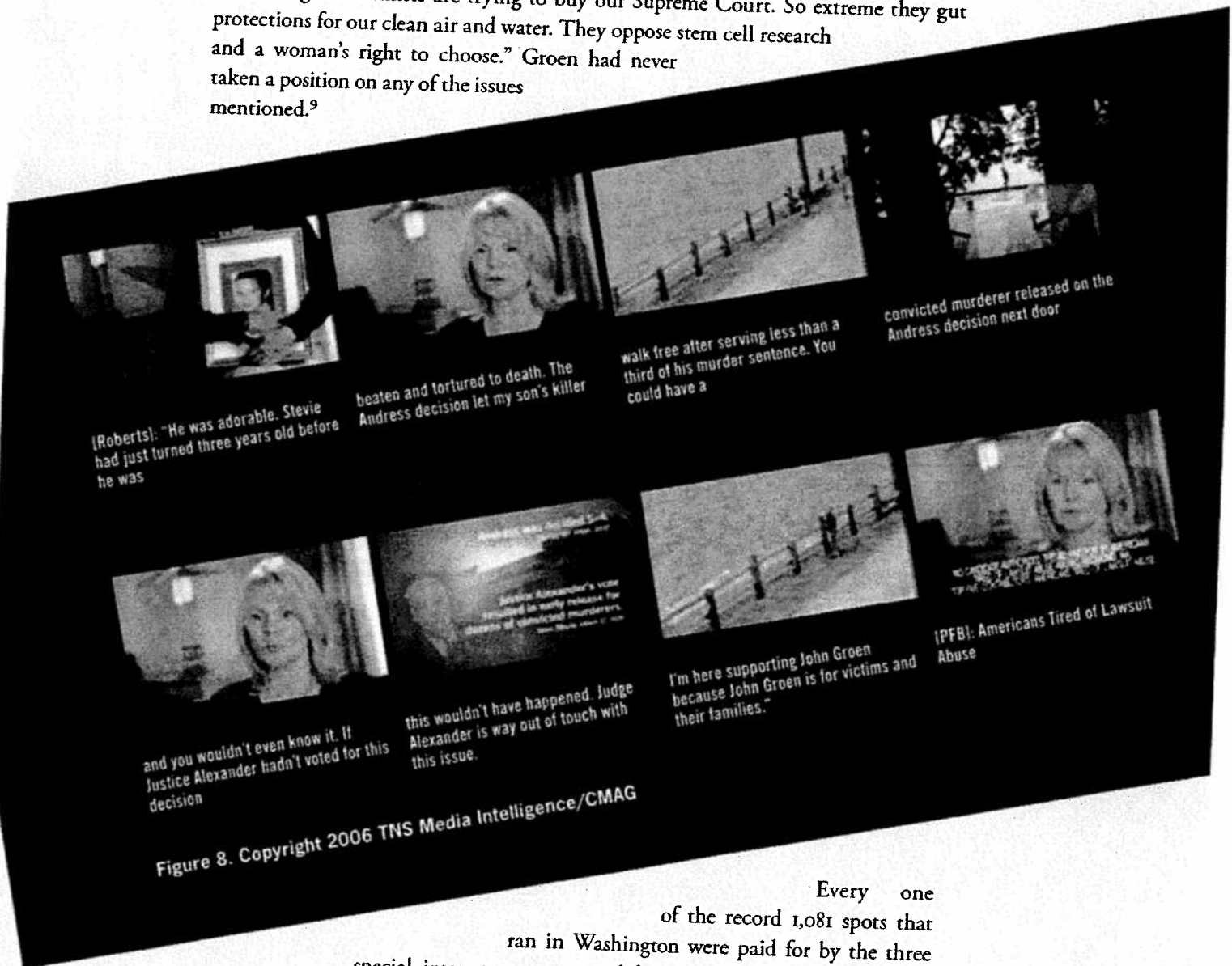


Figure 7.

TV Ads Continue to Dominate Supreme Court Races

decision, this wouldn't have happened." The ad did not explain the basis or context of the Andress decision or mention that four other justices voted with Alexander.

On the other side, CITIZENS TO UPHOLD THE CONSTITUTION, a coalition of trial lawyers and labor, environmental, and tribal groups ran an ad saying, "John Groen and far right extremists are trying to buy our Supreme Court. So extreme they gut protections for our clean air and water. They oppose stem cell research and a woman's right to choose." Groen had never taken a position on any of the issues mentioned.⁹



Every one of the record 1,081 spots that ran in Washington were paid for by the three special interest groups—candidates' campaign committees did not directly purchase a single television advertisement in Washington in 2006. Although the pro-business groups outspent the opposition on airtime by almost four to one, Groen lost.

⁹ "Odious Ads Smell Up Supreme Court Race," *Seattle Times*, September 17, 2006.

The Judicial Money Chase Spreads to More States

High-dollar court campaigns were once seen as abnormal battles in the ongoing state tort liability wars between trial lawyers and business groups. Now these costly campaigns are the norm. In the new politics of judicial elections, elected high court justices must routinely raise big money from special interests and attorneys whose cases they may later decide.

Since 1999 candidates for America's state high courts have raised over \$157 million, nearly double the amount raised by candidates in the four cycles prior. In the 2005-2006 cycle, candidates for state Supreme Court seats combined to raise \$34.4 million.¹⁰ The median amount raised in 2006 was \$243,910, up from \$201,623 in the 2004 election cycle. Third-party interest groups pumped at least \$8.5 million more into independent expenditure campaigns to support or oppose their candidates. In short, getting on to the bench has never been so expensive for so many.

2006 Brings Priciest Race Ever to Most States

Of the 10 states that had entirely privately financed contested Supreme Court campaigns in 2006, five (AL, GA, KY, OR, and WA) set state records for candidate fundraising in a single court race, as well as records for total fundraising by all high court candidates. Once independent expenditures are factored in, the dollar figures in many states climb much higher.

Candidates in **Alabama** combined to raise \$13.4 million, smashing the previous state record by more than a million dollars.¹¹ Three candidates for chief justice combined to raise \$8.2 million, setting a state record for the most expensive single race, and leading the winner to press for reform.¹² Since 1993, candidates running for Alabama's Supreme Court have raised more than \$54 million, and three of the four most expensive court races in American history have been fought out in Alabama. More details on the Alabama campaigns can be found on pages 4-5.

¹⁰ The aggregate decreased from the \$46.8 million raised in 2004, in large part because there were 27 contested races for state Supreme Court seats in 2006, compared to 33 in 2004.

¹¹ A previous edition of *The New Politics of Judicial Elections* incorrectly reported that candidates in the 2000 Alabama Supreme Court elections combined to raise over \$13 million. Records on file with the Alabama Secretary of State and the National Institute on Money in State Politics indicate that the correct figure for 2000 was \$12.3 million.

¹² This race also ranks as the second most expensive court campaign in American history, outpaced only by the \$9.3 million raised in a 2004 Illinois Supreme Court campaign.

Total Candidate Fundraising, 2005-2006 Supreme Court Elections

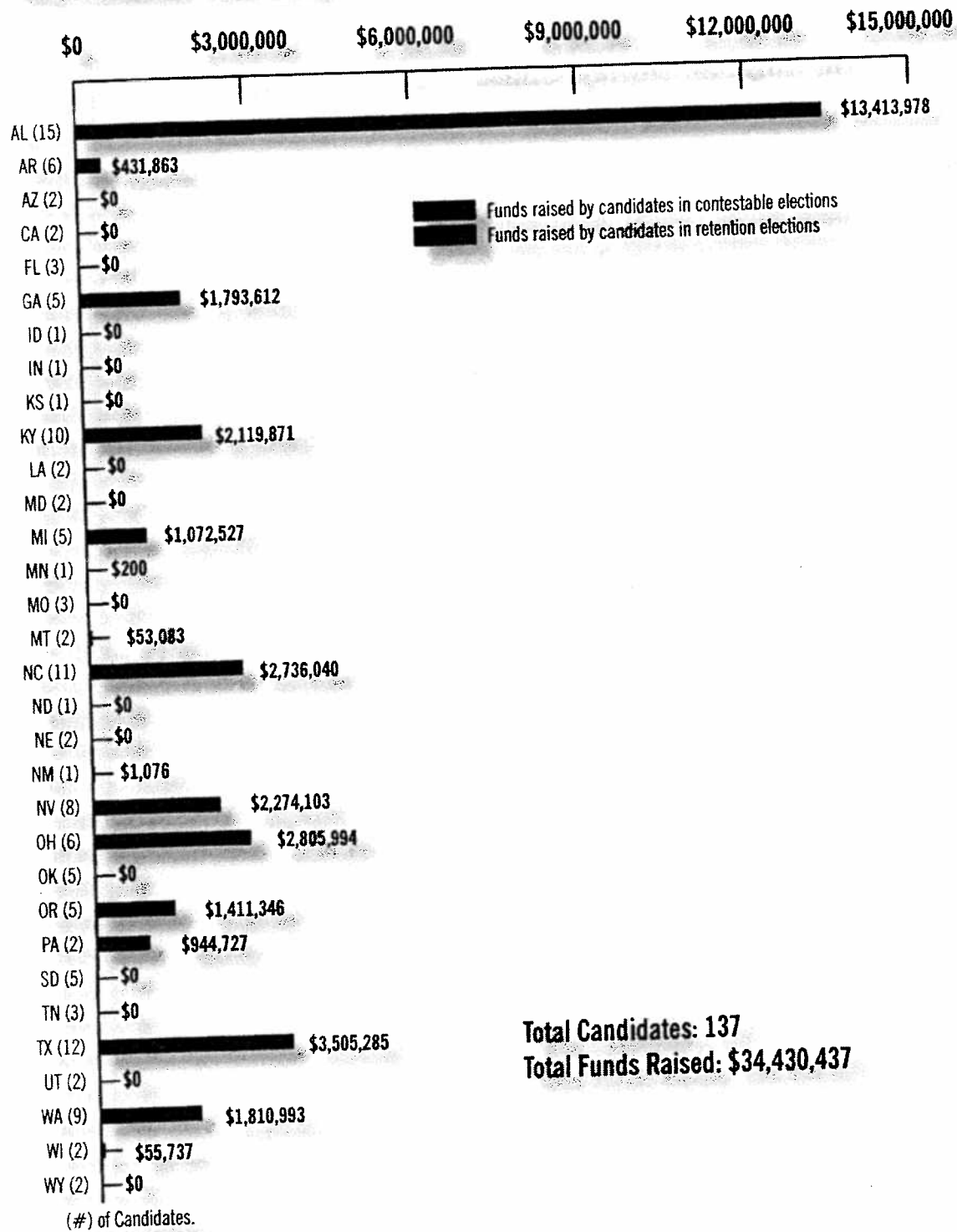


Figure 9.

Median Candidate Fundraising, 1999-2006 Supreme Court Elections

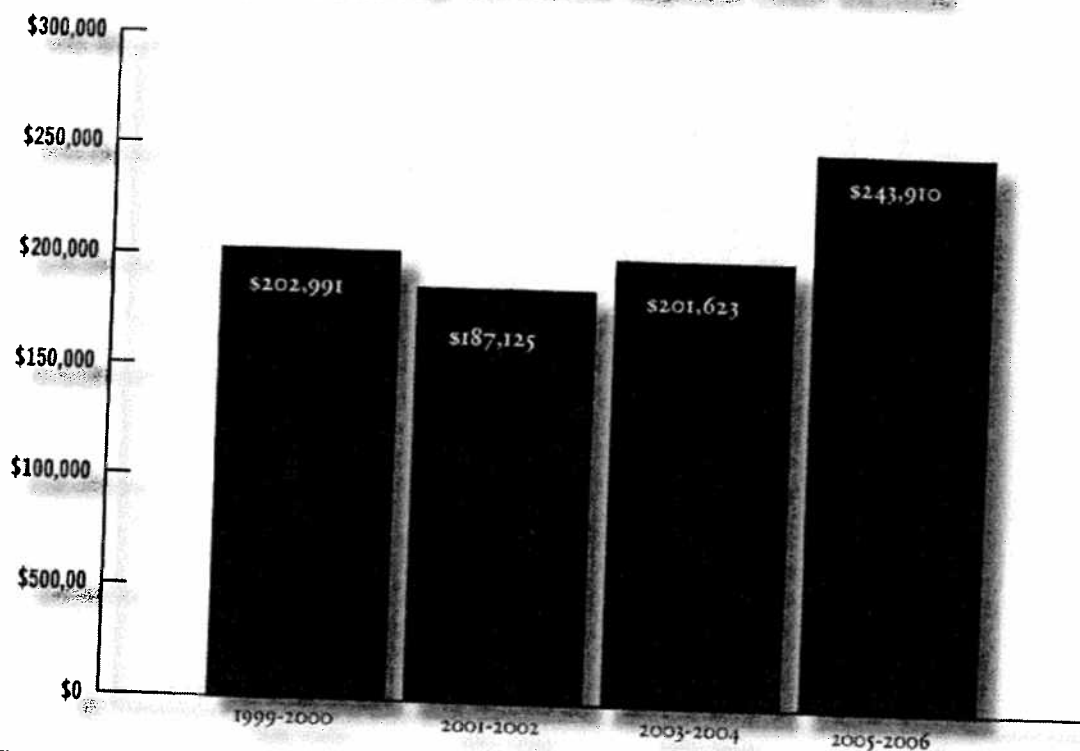


Figure 10. This figure shows the median amount raised by candidates for state Supreme Court seats who raised any money in their election campaign. A detailed breakdown by election type is shown on page 25.

Justice Carol Hunstein in **Georgia**, facing an assault from national business groups, raised \$1.38 million in her successful effort to hold her seat. In doing so, she more than doubled the record for fundraising by a candidate for the Georgia Supreme Court, which had been set in 2004. She's the first judicial candidate to break the \$1 million barrier in Georgia.

Three incumbents on the **Washington** Supreme Court attracted six challengers (though only half raised any money). The six candidates that did raise money combined to pull in \$1.8 million—a 31 percent jump in candidate fundraising from Washington's 2004 campaign. In 2006, about \$2.7 million more was spent by independent groups, far outstripping the candidates themselves.

In "Missouri Plan" states none of the 38 sitting state Supreme Court justices were targeted in their retention election campaigns in 2006 and only three raised any money. However, in November of 2005, two high court judges faced the wrath of **Pennsylvania** voters angry over a pay raise upheld by the court. Facing noisy and angry "Vote No" campaigns, Justice Russell Nigro raised \$587,970 and Justice Sandra Schultz Newman raised \$356,758 to defend themselves. Nigro narrowly lost, while Newman retained her seat by the slimmest of margins.

Source of Contributions to 2005–2006 Supreme Court Candidates

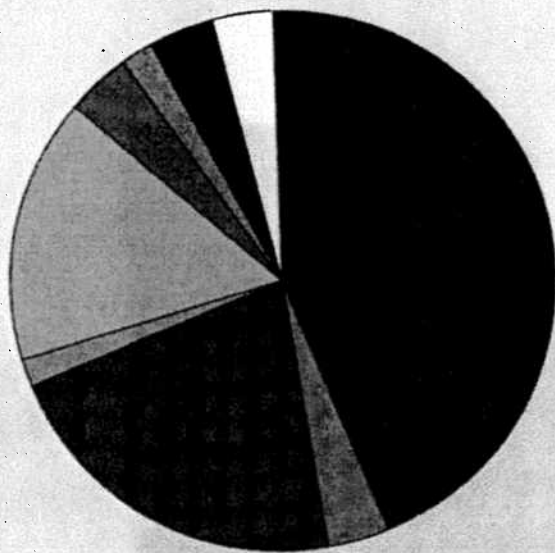


Figure 11.

Sector	Amount	Percent
Business	\$15,261,577	44%
Lawyers	\$7,358,826	21%
Unknown	\$5,419,367	16%
Party	\$1,376,455	4%
Candidate	\$1,296,748	4%
Other	\$1,232,306	4%
Public Subsidy	\$1,222,848	4%
Small Contributions	\$680,865	2%
Labor	\$581,445	2%
Total	\$34,430,437	100%

Business Interests Donate Twice as Much as Lawyers

This chart describes total contributions of \$34,430,437 to the 88 candidates who raised funds in the 2005–2006 state Supreme Court elections. Research by the National Institute on Money in State Politics has identified 84 percent of the funds by interest. The \$15,261,577 donated from business interests in 2005–2006 represents 44 percent of all donated funds—the most ever donated from any one single sector since the Institute began its recordkeeping in 1989. In 2005–2006, contributions from lawyers—\$7,358,826 or 21 percent—amounted to less than half of what business gave. Donations from political parties also dropped precipitously from 14 percent in 2003–2004 to only four percent in 2005–2006.

Relative Share of Contributions by Donor Interest, 1999–2006 Supreme Court Elections

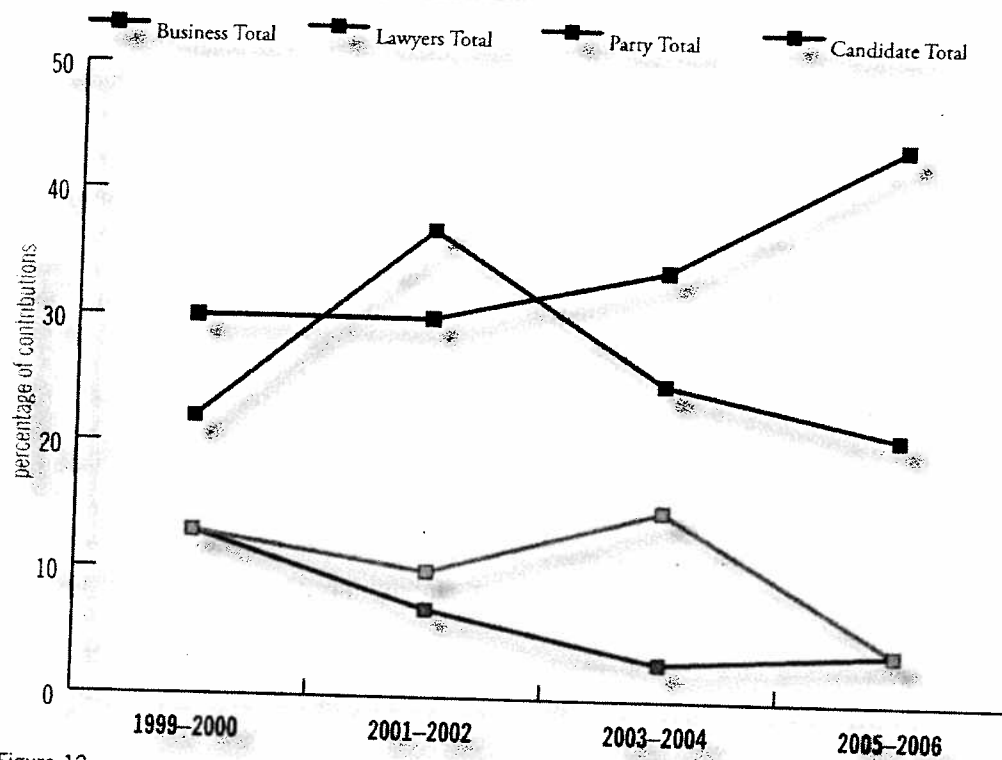


Figure 12.

Interest Groups Bring Their Checkbooks

Wealthy special interests also spent millions more to sway judicial elections, above and beyond their contributions to candidates. In many cases, independent expenditures from special interests significantly outpaced the candidate they were opposing. Third party groups are empowered by an absence of campaign finance regulation in many states, though in some they must disclose their donors. Absent contribution limits, which few states impose on independent expenditure committees, these groups routinely raise money in chunks of \$100,000 and up (see Figure 13).

In **Ohio** and **Michigan** organizations established by the U.S. Chamber of Commerce spent millions of dollars to support four candidates: Two incumbents in Michigan, and one incumbent and a candidate for an open seat in Ohio.

The **PARTNERSHIP FOR OHIO'S FUTURE**—which shares a mailing address and staff with the **OHIO CHAMBER OF COMMERCE**—raised \$1.3 million, according to campaign finance records, to back Justice Terrence O'Donnell and Robert Cupp. **Ohio's** campaign finance law allows unlimited corporate and union expenditures to support or oppose judicial candidates.

Despite token opposition in **Michigan**, two incumbent justices combined to raise close to \$1 million. Justice Maura Corrigan raised \$677,444 but also received over \$700,000 in television advertising support from the MICHIGAN CHAMBER OF COMMERCE.¹³

The NATIONAL ASSOCIATION OF MANUFACTURERS made a national splash in early 2005 when it announced that it would begin to support and oppose candidates for state judicial office through its AMERICAN JUSTICE PARTNERSHIP.¹⁴ Jack Roberts, an unsuccessful candidate for the Oregon Supreme Court, received two \$150,000 checks from the PARTNERSHIP.¹⁵ But the new business tiger's biggest investment was in **Georgia**, where the PARTNERSHIP-supported SAFETY AND PROSPERITY COALITION spent \$1.75 million on an independent campaign backing Mike Wiggins, a former deputy associate attorney general in the Justice Department, against incumbent Justice Carol Hunstein (see Georgia state profile on pages 22–23).

While candidates in **Washington** were busy breaking a fundraising record set just two years before, interest groups there provided nearly two dollars in independent expenditures for every one dollar raised by a high court candidate. Independent expenditures in Washington's Supreme Court campaigns totaled more than \$2.7 million: \$2.1 million in the primary (when two of three races were decided) and more than \$600,000 in the general election, prompting calls from Washington's governor for judicial public financing.¹⁶ IT'S TIME FOR A CHANGE—a political committee established by the BUILDING INDUSTRY ASSOCIATION OF WASHINGTON—was the largest such group, spending \$1.4 million to oppose the re-election of Chief Justice Gerry Alexander. IT'S TIME FOR A CHANGE's disclosure report shows six contributions—including one of \$530,000—from CHANGE PAC, whose contributors, in turn, are a veritable who's who of Republican donors. AMERICANS TIRED OF LAWSUIT ABUSE, an Alexandria, Virginia-based interest group, raised and spent \$400,000 opposing Alexander and backing challenger John Groen. Alexander received backing from CITIZENS TO UPHOLD THE CONSTITUTION, which raised over \$850,000, including 29 contributions of more than \$10,000 each (many from labor, education and tribal interests).

Big Money No Longer Guarantees Success at the Ballot Box

Since 2000, the correlation between winning the fundraising battle and winning election to the Supreme Court has exceeded 80 percent. In 2006 the candidate raising

¹³ Justice Corrigan's re-election campaign received contributions of \$20,000 each from the MICHIGAN CHAMBER OF COMMERCE, the MICHIGAN ASSOCIATION OF REALTORS, the MICHIGAN BANKERS ASSOCIATION, the MICHIGAN HEALTH AND HOSPITAL ASSOCIATION and the MICHIGAN RESTAURANT ASSOCIATION.

¹⁴ Tom Hamburger and Peter Wallsten, "Business lobby to get behind judicial bids," *Los Angeles Times*, January 6, 2005.

¹⁵ The PARTNERSHIP also made sizeable contributions to a candidate for the Illinois Court of Appeals.

¹⁶ Rachel La Corte, "Gregoire wants to try public financing of appeals court races," *Associated Press*, December 20, 2006.

Candidate Fundraising and Group Expenditures, 2006 Contested Supreme Court Elections

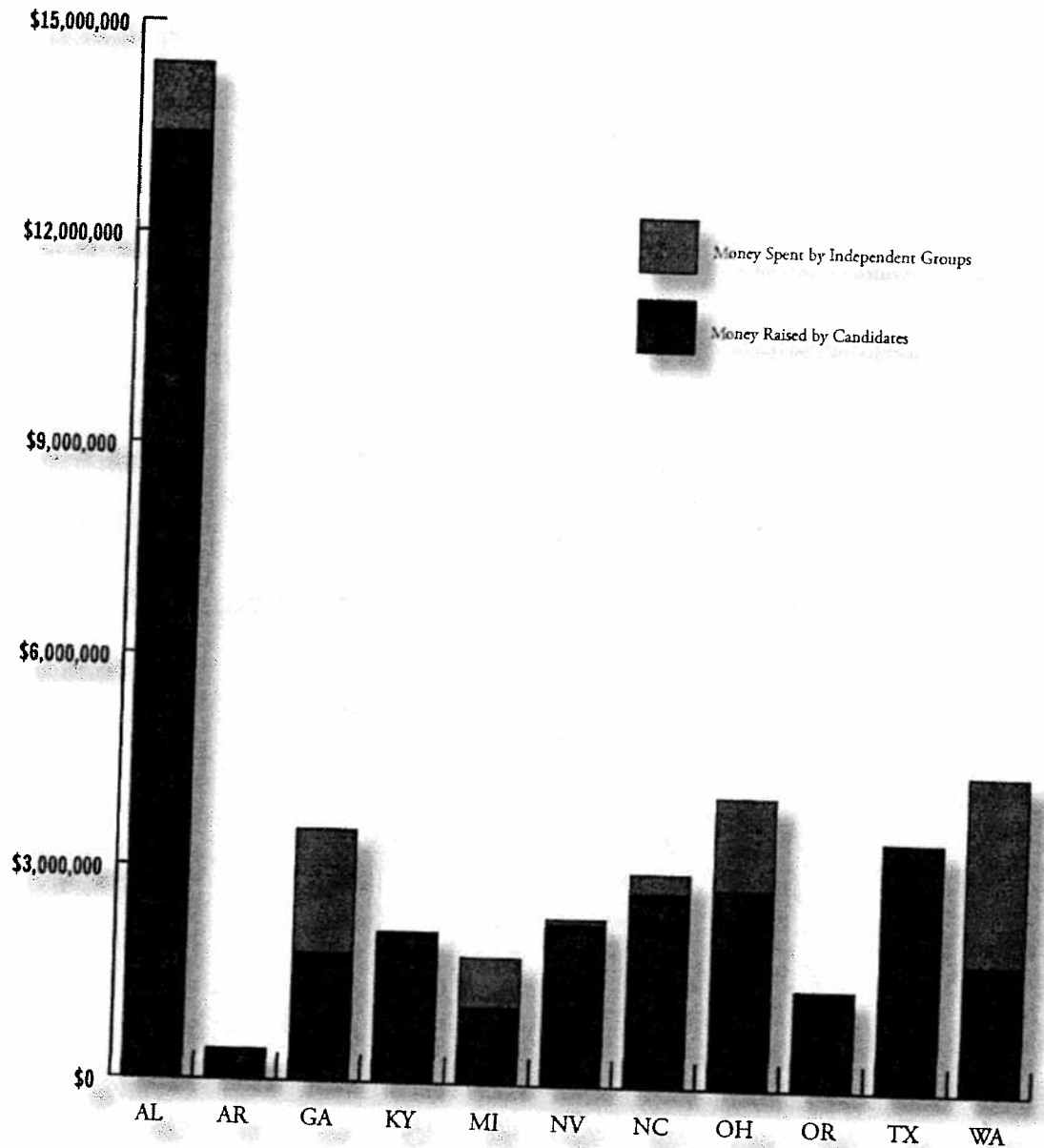


Figure 13. Candidate fundraising summaries are shown on page 16. Group expenditures are as follows: Alabama \$993,080 (estimated) by the AMERICAN TAXPAYERS ALLIANCE; Georgia \$1,746,155 by the SAFETY AND PROSPERITY COALITION; Michigan \$710,000 (estimated) by the MICHIGAN CHAMBER OF COMMERCE; Nevada \$73,221 by NEVADANS AGAINST JUDICIAL ACTIVISM; North Carolina \$270,470 by FAIRJUDGES.NET; Ohio \$1,297,744 by the PARTNERSHIP FOR OHIO'S FUTURE; Washington \$2,660,296 by AMERICANS TIRED OF LAWSUIT ABUSE, CITIZENS TO UPHOLD THE CONSTITUTION and IT'S TIME FOR A CHANGE. Candidate fundraising information is supplied by the National Institute on Money in State Politics. Group expenditures are collected from state campaign finance regulatory agencies and the Internal Revenue Service. Estimates for Alabama and Michigan, where disclosure of actual spending is unavailable, are drawn from television airtime estimates found in Part 1 of this report.



State in Focus: Georgia

Few states have been overwhelmed by the new politics of judicial elections in the way that Georgia has. In 2000, the lone race for the state's highest court yielded \$38,888 in fundraising. Six years later, a single titanic contest generated about \$4 million, including expenditures by outside groups and the Georgia GOP.

Of the \$1.75 million raised by the SAFETY AND PROSPERITY COALITION, \$1.3 million was funneled into the state from the Michigan-based AMERICAN JUSTICE PARTNERSHIP, including two \$500,000 contributions in early October. The COALITION used its budget to blast incumbent Carol Hunstein as a "liberal judicial activist" in radio and television commercials. U.S. Attorney General John Ashcroft recorded an automated phone call to voters endorsing Mike Wiggins, who worked with him at the Justice Department. "He will protect us from terrorists and criminals," said Ashcroft, calling

(Announcer): We expect only experienced judges to serve on Georgia's Supreme Court.

WE EXPECT EXPERIENCED JUDGES on the Georgia Supreme Court

But Mike Wiggins has never tried a case. We expect our Supreme Court to uphold Georgia values but Mike Wiggins was

sued by his own mother for taking her money. He sued his only sister.

Mike Wiggins... The WRONG experience The WRONG values

THE JUDGE ORDERED WIGGINS NEVER TO HAVE CONTACT WITH HIS SISTER

Wiggins. The wrong experience. The wrong values for the Supreme Court.

Mike Wiggins SUEB HIS SISTER

She said he threatened to kill her while she was eight months pregnant.

A judge order Wiggins never to have contact with her again. Mike

(PFBI): COMMITTEE TO RE-ELECT JUSTICE CAROL HUNSTEIN

Figure 14. Copyright 2006 TNS Media Intelligence/CMAG

Hunstein "a liberal incumbent activist judge who will stop at nothing to win." The GEORGIA REPUBLICAN PARTY also spent an estimated \$550,003 on TV airtime to support Wiggins.

Hunstein's campaign was chaired by Georgia political icon Zell Miller, who appointed her to the bench in 1992. Even though state law limits individual contributions to \$5,000, Hunstein raised over \$1.38 million. When the SAFETY AND PROSPERITY COALITION went negative, according to an analysis by the nonpartisan political website FactCheck.org,

"Hunstein came back hard with an ad attacking her opponent...on extremely personal grounds. She claimed that Wiggins was 'sued by his own mother for taking her money,' that he sued his sister, and that the sister said Wiggins threatened to kill her."

Although Wiggins raised far less on his own than Hunstein, his enormous support from outside groups drew questions. A complaint filed with the Georgia Ethics Commission named both Wiggins and the COALITION as respondents, alleging coordinated political activity between the two camps, which is illegal under Georgia election law. According to exhibits attached to the complaint, consultants to the COALITION provided Wiggins with talking points for running against another incumbent, Justice Hugh Thompson. (Wiggins' decision to run against Hunstein, rather than one of the three white male incumbents also on the ballot, was the subject of local political speculation.) In an email, a COALITION consultant suggested that if Wiggins ran against Thompson instead of Hunstein, he should be prepared to explain why—and that Wiggins couldn't justify the decision by calling Hunstein "a one legged, Jewish female from Dekalb County with lots of money in the bank and Zell [Miller] as her campaign chair."

BEFORE THE STATE ETHICS COMMISSION
STATE OF GEORGIA

IN THE MATTER OF: MIKE WIGGINS FOR GEORGIA SUPREME COURT

GARY B. ANDREWS,
Complainant,

MIKE WIGGINS, candidate for Justice of the Georgia Supreme Court; MIKE WIGGINS FOR GEORGIA SUPREME COURT, a political committee; and SAFETY AND PROSPERITY COALITION,
Respondents.

Case Number _____

COMPLAINT

Mike Wiggins, his campaign committee, and an entity known as the Safety and Prosperity Coalition ("SPC") are engaged in an illegal and coordinated effort to improperly influence the outcome of the November 7 election for Justice of the Supreme Court in violation of the Ethics in Government Act. Georgia law limits contributions to Supreme Court candidates to \$5,000 per person. However, under the guise that the SPC is an "independent committee" not subject to any limits, respondents have been accepting contributions of as much as \$100,000 from a single source and using these funds to run television advertisements supporting Mr. Wiggins. In fact, the SPC – an entity comprised in large part of a few insurance companies and out of state corporations – is closely affiliated with Mr. Wiggins, having recruited him to be a

Received
OCT 18 2006
STATE ETHICS COMMISSION

Figure 15.

more money won 68 percent of the time.¹⁷ Although this dip could portend a voter backlash against big-money, heavy-handed court campaigns, it's not yet clear whether the complicated politics of 2006 represent a blip or a new countervailing trend.

William O'Neill, a challenger to Justice Terrence O'Donnell in Ohio, tried to capitalize on voter queasiness when he announced that he would not raise money for his campaign. "Voters in Ohio have had it up to their ears with judges taking money and then sitting on their contributors' cases," O'Neill told the media.¹⁸

Watch Out Below! Big Money Seeps Down-Ballot

In 2006 a new—and potentially troubling—trend emerged: The prospect that interest groups will start targeting judges further down the ballot with the same big money and bare-knuckle tactics they use in state high court elections. After all, the vast majority of civil cases are resolved by trial and intermediate courts, not state Supreme Courts.

In **Illinois**, which smashed the national record for a high court campaign in 2004, many of the same players waged a new battle over a seat on the state's court of appeals. Trial lawyers and corporate interests in a southern Illinois race combined to give more than \$3.3 million to the two candidates, quadrupling the state record.¹⁹ Madison County, where tort liability awards have riled national business interests, witnessed a \$500,000 *trial court* campaign in 2006.

In **Missouri** another trial court race attracted special interest money, this time from outside the state. After a Cole County judge upheld the state's rejection of ballot measures, angry litigants exacted revenge by ousting the judge's colleague. The Chicago-based AMERICANS FOR LIMITED GOVERNMENT poured \$175,000 into a group in Jefferson City, Missouri called CITIZENS FOR JUDICIAL REFORM. In turn, they ran nasty radio and TV ads and issued slick full-color direct mail urging voters to punish Judge Tom Brown for a series of "activist" decisions.²⁰ According to the political consultant who coordinated the anti-Brown effort: "I think some of these [interest] groups just want a scalp on the wall."²¹ The message could not be more clear: judges who want to keep their jobs must answer to interest groups and political partisans.

¹⁷ This analysis looked at 25 Supreme Court campaigns in 2006, finding that 17 candidates who won the fundraising battle also won the election. Justice Carol Hunstein of Georgia is counted as one of eight who won despite being out-raised. Though Hunstein's campaign raised more money (\$1.38 million) than Mike Wiggins' campaign (\$310,702), Wiggins benefitted from \$1.75 million in support from the SAFETY AND PROSPERITY COALITION. Two races between exclusively publicly-financed candidates in North Carolina have been excluded from this calculation.

¹⁸ T.C. Brown, "High court candidate vows he will take no money," *Cleveland Plain Dealer*, May 4, 2006. O'Neill's campaign finance reports show that he gave his own campaign \$37,500, mostly for mileage donations and other in-kind contributions. He also received a small number of contributions early in 2005, prior to his announcement.

¹⁹ According to the Illinois Campaign for Political Reform, the previous record for an Illinois Court of Appeals campaign was \$679,225. That mark was set in a 2004 campaign.

²⁰ Jeff Haldiman, "Dirty politics hits home," *Jefferson City News Tribune*, November 3, 2006.

²¹ The political consultant who directed the anti-Brown campaign made this comment in remarks delivered at a post-election forum in Kansas City.

Median Amounts Raised by Election Type, 1999-2006 Supreme Court Elections

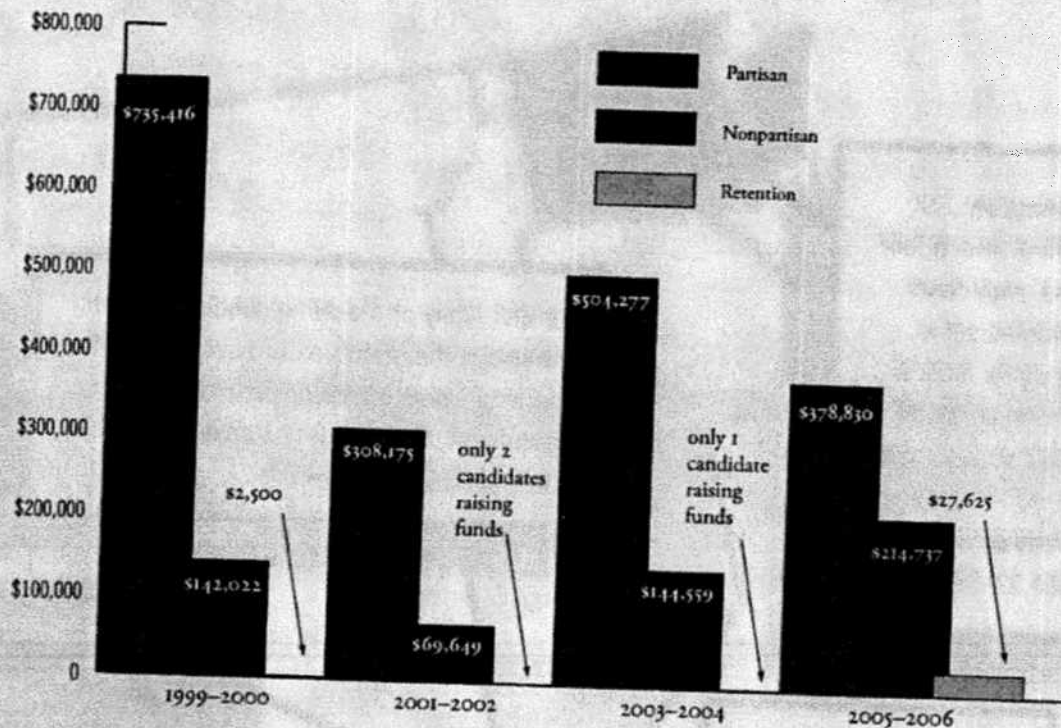


Figure 16.

Partisan category includes:

Alabama, Illinois*, Louisiana, Michigan*, North Carolina*, New Mexico*, Ohio*, Pennsylvania*, Texas, West Virginia.

Nonpartisan category includes:

Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana*, North Carolina*, North Dakota, Nevada, Oregon, Washington, Wisconsin.

Retention category includes:

Alaska, Arizona, California, Colorado, Florida, Iowa, Illinois*, Indiana, Kansas, Maryland, Missouri, Montana*, Nebraska, New Mexico*, Oklahoma, Pennsylvania*, South Dakota, Utah, Wyoming

*Classification Notes:

Ohio and Michigan are categorized as partisan states, even though candidates are not identified by party on the ballots. In both states, candidates are identified with parties during the campaign season; in Michigan, parties nominate the candidates. In Illinois, justices are first selected in partisan elections and thereafter stand in retention elections. In New Mexico, justices are appointed, but must run in a partisan election the first time they defend their office. After that, all elections are retention contests. In Montana, justices run in nonpartisan, contested elections; incumbents without an opponent run in retention elections. North Carolina held partisan elections until the 2004 cycle, when public funding was introduced and high court elections became nonpartisan. In Pennsylvania, candidates run for a first full term in partisan elections and run in retention elections thereafter.

2005–2006 Supreme Court Elections and Ballot Measures: A National Snapshot

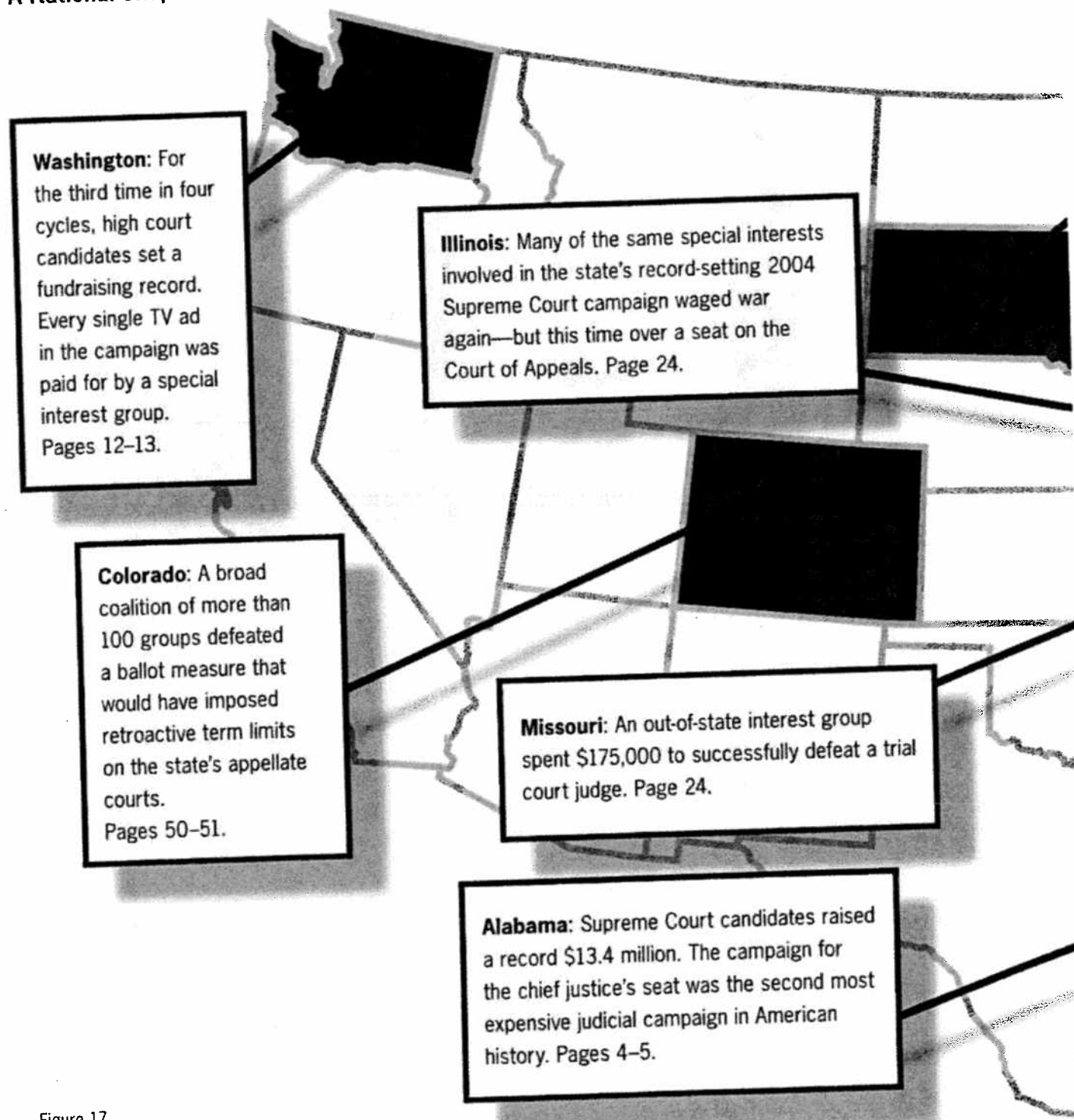
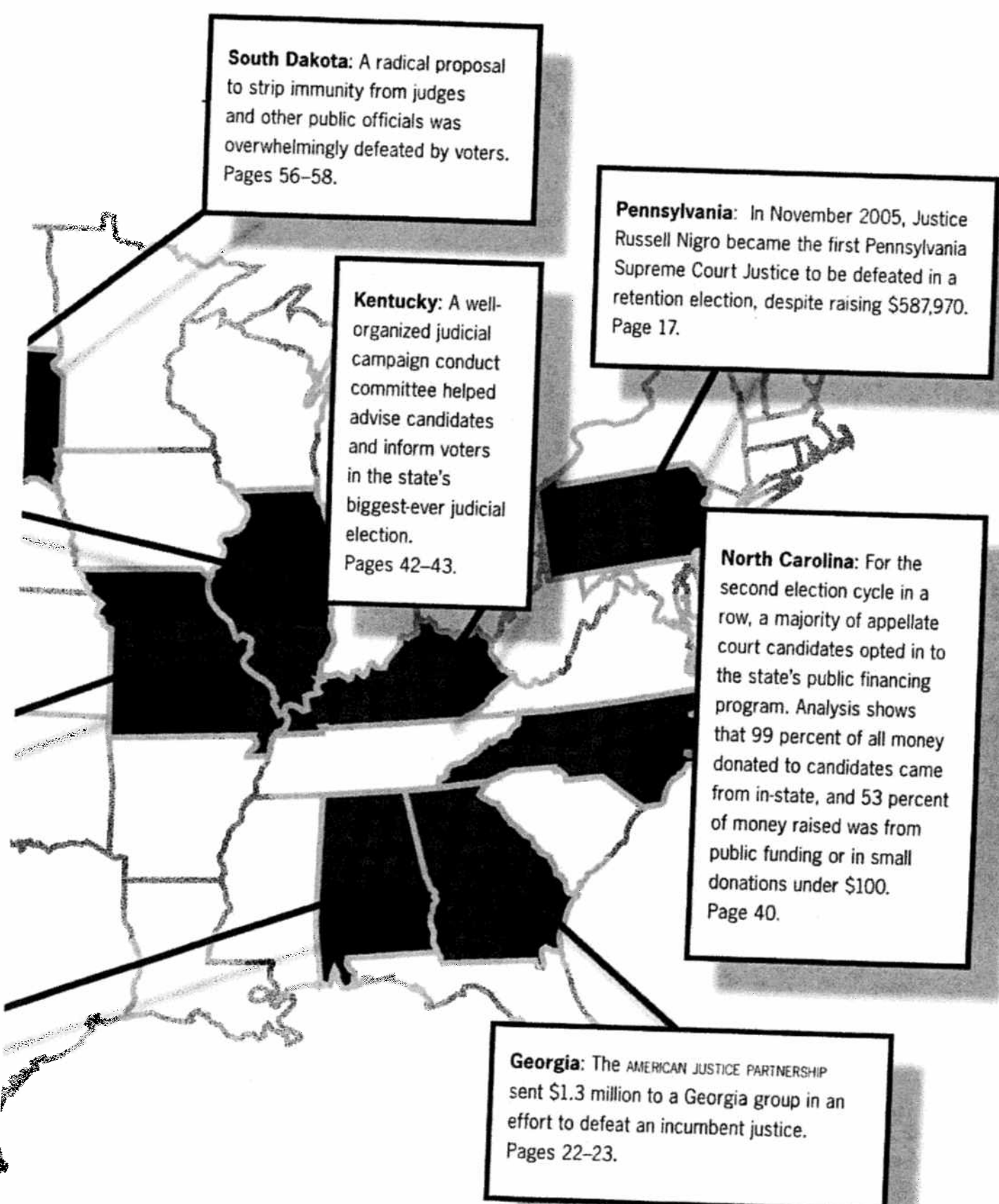


Figure 17.



South Dakota: A radical proposal to strip immunity from judges and other public officials was overwhelmingly defeated by voters. Pages 56–58.

Pennsylvania: In November 2005, Justice Russell Nigro became the first Pennsylvania Supreme Court Justice to be defeated in a retention election, despite raising \$587,970. Page 17.

Kentucky: A well-organized judicial campaign conduct committee helped advise candidates and inform voters in the state's biggest-ever judicial election. Pages 42–43.

North Carolina: For the second election cycle in a row, a majority of appellate court candidates opted in to the state's public financing program. Analysis shows that 99 percent of all money donated to candidates came from in-state, and 53 percent of money raised was from public funding or in small donations under \$100. Page 40.

Georgia: The AMERICAN JUSTICE PARTNERSHIP sent \$1.3 million to a Georgia group in an effort to defeat an incumbent justice. Pages 22–23.

When Judicial Candidates Speak Out, Who Wins?

Special interests are not content to rely on fat checkbooks and nasty TV ads to throw their weight around in judicial contests. They're trying to pressure candidates into making statements on the campaign trail that could appear to bias the judges before they take their seat on the bench. The growing dilemma over judicial campaign speech poses grave perils for impartial justice, but 2006 also showed that many judges are prepared to stand up for fair courts.

A legislative or executive candidate is supposed to make promises to voters, and then keep them if they are elected. But a judge has a different job: To decide cases one at a time, based on the facts and the law, without regard to campaign promises. Telegraphing decisions in advance, explicitly or implicitly, would make a mockery of equal justice and undermine public confidence in the right to a fair trial. That is why state ethics codes have traditionally been crafted to promote the impartiality and independence of the courts—in reality, and in appearance—by preventing judicial candidates from making promises about how they would decide cases, or in engaging in speech which comes too close to implying a promise.

In the 2002 decision, *Republican Party of Minnesota v. White*, the U.S. Supreme Court changed the rules for judicial elections in America. By a 5-4 vote, the Court struck down Minnesota's "Announce Clause," which prohibited a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues."²² One consequence of *White* is that special interests can pressure judicial candidates to publicize their political views, or risk being targeted for defeat if they do not.

White has triggered special interest lawsuits seeking to knock down many state judicial ethics codes, with some success to date.²³ *White* has also emboldened many interest groups to step up their demands, chiefly through aggressive questionnaires.

But *White* has also prompted a national round of second thoughts: Retired Justice Sandra Day O'Connor—who cast one of five votes to loosen judicial speech codes, told a legal audience in California that while she does not second-guess many of her decisions, the *White* case "does give me pause."²⁴ It has also prompted a backlash on

²² 122 S. Ct. 2528 (2002). Eight other state codes used similar language (AZ, CO, IA, MD, MS, MO, NM & PA) at the time.

²³ Since *White*, lawsuits have been filed challenging variations of "Commit Clause," the "Pledge or Promise Clause," partisan activity clauses, and recusal rules. In addition to undermining ongoing campaigns, questionnaires are also being used to undermine judicial independence over the longer-term. The latter is accomplished via a strategy in which candidates who cite the Code of Judicial Conduct as a reason for declining to respond end up triggering lawsuits challenging provisions in the Code. Such lawsuits have been brought in Alaska, Florida, Indiana, Kansas, Kentucky, North Dakota, and Pennsylvania.

²⁴ Matthew Hirsch, "Swing voter's lament: At least one case still bugs O'Connor," *The Recorder*, November 8, 2006.

PLEASE RETURN THIS QUESTIONNAIRE IN THE STAMPED
SELF-ADDRESSED ENVELOPE TO:
KJW PAC, 105 E. RHONDDA, ANDOVER, KS 67002,
NOT LATER THAN MARCH 13, 2006.

The Kansas Supreme Court violated the Separation of Powers provision of the State Constitution in its recent series of rulings in *Montoy vs. State*, 279 Kan. 817 (2005), mandating specified spending levels for Kansas education funding.

____ Agree ____ Disagree ____ Undecided ____ Decline to Respond ____ Refuse to Respond

2. Under the Kansas Constitution, the Kansas State powers to tax its citizens and spend the revenues are the sole prerogative of the Kansas state legislature and not the Kansas Supreme Court.

____ Agree ____ Disagree ____ Undecided ____ Decline to Respond ____ Refuse to Respond

3. Under the Kansas Constitution, a statute defining marriage as between one man and one woman is the prerogative of the Kansas State Legislature, not the Kansas Supreme Court.

____ Agree ____ Disagree ____ Undecided ____ Decline to Respond ____ Refuse to Respond

4. Marriage should only be between one man and one woman.

____ Agree ____ Disagree ____ Undecided ____ Decline to Respond ____ Refuse to Respond

5. Under the United States and Kansas Constitutions, local community standards should be the major determinant of the definition of pornography as a punishable offense.

____ Agree ____ Disagree ____ Undecided ____ Decline to Respond ____ Refuse to Respond

* This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Kansas Canon of Judicial Conduct 5A(3)(i) and (ii), which forbids judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself as a judge in any proceeding concerning this answer on account of Kansas Canon 3E(1), which requires a judge or judicial candidate to recuse him or herself when "the judge's impartiality might reasonably be questioned."

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the part of judges and judicial candidates who are ready to stand up to special interests by refusing to be trapped by campaign questionnaires. Most intriguing of all, a number of the most outspoken judicial candidates were snubbed by voters in 2006.

Interest Groups Ratchet Up High-Pressure Questionnaires— But Many Judges Refuse to Play Along

Questionnaires have emerged as the weapon of choice for interest groups seeking to pressure candidates into making statements about issues before they land in court. Questionnaires require judicial candidates to distill complex legal issues down to a simple check in a box. Few of the questionnaires seek

any sort of narrative response from

the candidates. Many give only a passing glance to a

candidate's legal experience, education or approach to the administration

of justice—information that could be highly valuable to voters trying to pick a

candidate. Instead, they seek to box in candidates on hot-button legal and political

issues. Would-be judges know that their answers could trigger significant money,

political ads and grass-roots campaigns for or against their candidacy.

The majority of questionnaires that appeared in 2006 judicial elections were distributed by socially or politically conservative interest groups. These groups pressed more judicial candidates than ever to "announce" their position on issues, such as abortion, school choice, and same-sex marriage. NORTH CAROLINA RIGHT TO LIFE and KENTUCKY RIGHT TO LIFE both asked judicial candidates to agree or disagree with the following statement: "I believe that *Roe v. Wade* was wrongly decided." KANSAS JUDICIAL WATCH asked candidates to agree or disagree with the following statement: "Under the Kansas Constitution, a statute defining marriage as between one man and one woman is the prerogative of the Kansas State Legislature, not the Kansas Supreme Court." In Alabama the CHRISTIAN ACTION ALABAMA voter guide (See Figure 19)

Figure 18.

ALABAMA Chief Justice		
Drayton Nabers (R)	ISSUES	Sue Bell Cobb (D)
Agree	Unborn Child is Fellow Human Being	No Response
Agree	Home School Education Tax Credits	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Voter Identification	No Response
Agree	The State Can Acknowledge God	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response
Disagree	Judicial Branch May Impose Taxes	No Response
Disagree	Same Sex Marriage	No Response

Figure 19.

labeled judicial candidates as Agree or Disagree with statements like "Unborn Child is Fellow Human Being," "Home School Education Tax Credits," "Oppose Establishment of Gambling," "The State Can Acknowledge God," and "Same Sex Marriage."

Some liberal groups have gotten in on the act. In early 2006, the INDEPENDENT VOTERS OF ILLINOIS-INDEPENDENT PRECINCT ORGANIZATION (IVI-IPO) circulated a questionnaire insisting that judicial candidates "announce" their positions on the death penalty, "the right of a woman to have an abortion," mandatory minimum sentences, and other hot-button social issues.

Read interest group questionnaires and voter guides online at justiceatstake.org

As questionnaires become increasingly aggressive, a growing number of judges are being advised to treat them warily.²⁵ As Mark White, an Alabama attorney and expert on judicial speech issues, puts it, "When you send a candidate a questionnaire and say you cannot give a narrative response, then I think that's grossly unfair. That demonstrates...[that] whoever's asking the question not only wants to frame the question, they want to frame the answer."²⁶

²⁵ See "How should judicial candidates respond to questionnaires?" Advisory memorandum issued by the Ad Hoc Committee on Judicial Campaign Conduct, August 28, 2006. Available at: http://www.judicialcampaignconduct.org/Advice_on_Questionnaires-Final.pdf

²⁶ Ari Shapiro, "Questionnaires test judges candidates' views," National Public Radio story aired on October 10, 2006 and available at <http://www.npr.org/templates/story/story.php?storyId=6241933>

State in Focus: Florida

The Florida Family Policy Council sent a questionnaire to 128 candidates for seats on Florida's Circuit Courts, demanding answers to questions ranging from "If you have children, how many?" to queries about recent rulings from the Florida Supreme Court on school vouchers. According to the group's website, judicial candidates avoided it in droves. Many candidates ignored the questionnaire in its entirety, and others responded with letters outlining why they objected to this sort of full-court press.

Figure 20.


The Florida Family Policy Council's
2006 Statewide Judicial Candidate Questionnaire

www.FLFamily.org

1. What is your current marital status?
2. If you have children, how many?
3. Do you have any military experience? No Yes If yes, what branch?
4. Of what charitable, community, civic, fraternal, or religious organizations are you a member?
5. To what charitable, community, civic, fraternal or religious organizations have you made contributions in the past three (3) years?
6. Which of the current Justices of the U.S. Supreme Court most reflects your judicial philosophy?
7. Which of the current Justices of the Florida Supreme Court most reflects your judicial philosophy?
8. Do you agree with the following statement? "The Florida Constitution recognizes a right to same-sex marriage."
 - Agree
 - Disagree
 - Undecided
 - Decline*
 - Refuse to Respond
9. In re: TW, 551 So. 2d 1186 (Fla. 1989), held that a Florida law requiring parental consent before a minor child can undergo an abortion surgery was unconstitutional under Art. I, Sec. 23 of the Florida Constitution. The Florida Supreme Court held that the challenged statute fails because it intrudes upon the privacy of the pregnant minor from conception to birth. The TW court also ruled that where parental rights over a minor child are concerned, neither the state's interest in protecting a minor child nor the preservation of the family unit is sufficiently compelling under Florida law to override Florida's privacy amendment. Do you agree with the Court's ruling in In re: TW?
 - Agree
 - Disagree
 - Undecided
 - Decline*
 - Refuse to Respond
10. In *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997), the Florida Supreme Court held that a statute prohibiting assisted suicide did not violate Art. I, Sec. 23 (the Privacy Clause) of the Florida Constitution, because any asserted privacy interest in assisted suicide was outweighed by state's compelling interests in preserving life, preventing suicide, and maintaining integrity of medical profession. Do you agree with the court's decision in *Krischer*?
 - Agree
 - Disagree
 - Undecided
 - Decline*
 - Refuse to Respond

Percentage of Candidates Who Responded to Questions

- Education Vouchers: 15%
- Gay Adoption: 16%
- Assisted Suicide: 16%
- Same Sex Marriage: 17%
- U.S. Justice Most Reflective of Your Philosophy: 17%



“ I have spent a good portion of my life thinking about issues related to the judiciary. My experiences lead me to conclude without reservation that questionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad—bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida. I say this because such questionnaires create the impression in the minds of voters that judges are no different from politicians—that they decide cases based on their personal biases and prejudices. Of course, nothing could be further from the truth. ”

—Judge Peter D. Webster, First District Court of Appeal, State of Florida, in a letter to the President of the Florida Family Policy Council

In Iowa the *Des Moines Register* suggested that judges faced with a questionnaire from IOWANS CONCERNED ABOUT JUDGES—an alliance of social conservative groups—“should politely decline.” The *Register* noted that “Iowans have a right to know whether...judges who are up for retention this fall are fit to continue serving, but they should not expect any commitments in advance on how judges would rule on specific issues...If voters want to remove a judge, they should have a good reason for doing so. An answer on a questionnaire from a special interest group is not a good reason.”²⁷ The editorial may have had an impact: Of 85 Iowa candidates for appellate or trial judgeships, 72 did not respond, 12 sent letters declining to answer questions on cases or controversies, while one candidate answered two questions but declined to answer the rest.

Indeed, available evidence shows that in many instances, judicial candidates disregarded the “agree” or “disagree” boxes and either ignored the questionnaires completely, responded with polite declinations to answer, or, in some cases, even took the interest groups to task. For example, when the TENNESSEE FAMILY ACTION COUNCIL sent a questionnaire to 64 Tennessee judges, only three gave limited responses. Thirty-five did not respond, and 25 returned the questionnaire with a letter declining to participate. Wrote Judge John Everett Williams: “I do not wish to hint or signal that I am predisposed to rule on any matter that may come before me as a judge. I have pledged to maintain the highest degree of ethical conduct.” In Georgia Justice Carol Hunstein refused to answer a questionnaire from the GEORGIA CHRISTIAN COALITION. In declining, Hunstein told the group: “I submit to you that any candidate who expresses a personal viewpoint on an issue in advance of having to decide that issue...compromises his or her objectivity with respect to a case that may come before the court.”²⁸

Not surprisingly, some special interests try to punish judges who won’t play their game. Lacking responses to their inquiries, some “nonpartisan” groups took it upon themselves to characterize certain judicial candidates. THE FAITH & FREEDOM NETWORK in Washington state issued a “nonpartisan voter guide” that noted Justice Tom Chambers refused to answer their questionnaire. Nonetheless, they observed in their guide that he “ruled to allow a non-custodial lesbian couple custody of a child” and “ruled in favor of tax money being spent on benefits for homosexual couples.”

When Judicial Candidates Speak Out, Who Wins?

White has also produced a modest but detectable increase in the number of judicial candidates willing to speak out more on the campaign trail. In 2003 Pennsylvania Justice Max Baer declared that he was “pro choice and proud of it.” Baer won, saying that he prevailed because he’d told the voters what they wanted to hear.²⁹

²⁷ “Keep wedge politics out of judicial voting,” *Des Moines Register*, August 18, 2006.

²⁸ Alyson M. Palmer, “Justice says no thanks to Christian Coalition,” (Fulton County) *Daily Report*, August 16, 2006.

²⁹ Others attribute his victory to a large-scale turn-out effort for the Democratic mayor of Philadelphia.



Figure 21. Copyright 2006 TNS Media Intelligence/CMAG

But in 2006, judicial candidates who sought to put disputed political and legal issues at the center of their candidacy lost more often than they won. In state after state, the more that judicial campaigns sounded like politics as usual, the warier the voters seemed.

For example, in **Alabama**, the tone for a bitter Republican primary was set months before the election, when Justice Tom Parker published a blistering op-ed in the *Birmingham News* attacking many of his Supreme Court colleagues about a death penalty case involving a convicted rapist and killer named Renaldo Adams. Wrote Parker: "My fellow Alabama justices freed Adams from death row not because of any error of our courts but because they chose passively to accommodate—rather than actively resist—the unconstitutional opinion of five liberal justices of the U.S. Supreme Court."³⁰ Parker featured the Adams case in a TV commercial attacking Chief Justice Drayton Nabers (see Alabama profile on pages 4–5). On his website he attacked "liberal activist judges. . . . [who] invoke the Constitution even as they subvert it to promote the radical homosexual agenda, overturn the death penalty for murderers, ban school prayer, order tax increases without our consent, and attack the

³⁰ Tom Parker, "Alabama justices surrender to judicial activism," *Birmingham News*, January 1, 2006.

Boy Scouts of America.” He continued with a jab at his primary opponent: “All across America, and even in Alabama, supposedly ‘conservative’ elected officials refuse to defend the rights and laws of the people of our state against liberal activist judges.”

Nabers also made very direct political appeals to voters. In one TV ad, he appeared on camera to say, “Abortion on demand is a tragedy, and the liberal judicial decisions that support it are wrong.” His considerable fundraising advantage over Parker, combined with more than \$700,000 in advertising support from the AMERICAN TAXPAYERS ALLIANCE, helped turn the campaign in his favor. In the end, Alabama Republican voters rejected Parker’s outspoken message, giving him less than 39 percent in the primary.

In the general election, Nabers faced Judge Sue Bell Cobb, the lone Democrat on the state’s Court of Appeals. Nabers’ ads attacked Cobb’s campaign for taking “gambling money,” referring to a racetrack owner whose appeal was pending before the Supreme Court.³¹ Cobb ran a more traditional judicial campaign, with a signature television commercial that promoted her biography and qualifications.³² Voters narrowly chose Cobb and ousted Nabers, even as they re-elected a Republican governor.

A 2006 high court campaign in **Arkansas** was in some ways a referendum on the candidacy of Wendell Griffen, the state’s most outspoken judge. Griffen has been the frequent subject of investigations by the state’s Judicial Disciplinary and Disability Commission, and three complaints were filed against him during the 2006 campaign cycle. One cited his remarks to the NAACP where he denounced certain Caucasian religious leaders as “pimps of piety”; attacked the government’s response to Hurricane Katrina as a prime example of “racism and classism” in America; lambasted the president, vice president, and U.S. Supreme Court Justice Clarence Thomas; criticized the nomination of John Roberts to the U.S. Supreme Court; and pledged his “wholehearted support” to a proposed amendment to the Arkansas Constitution to increase the minimum wage. Throughout his campaign to move up to the state’s high court, Griffen repeatedly challenged his opponent, Paul Danielson, to publicly debate their views. The race was nonpartisan, with modest fundraising on both sides. Voters chose Danielson by 14 points.

In **Kentucky** Rick Johnson and Bill Cunningham faced off for an open seat on the Kentucky Supreme Court. Johnson embraced *White*: “The rules have changed. I agree with the new rule because I believe the old system kept the voters in the dark and was arbitrary and elitist.” He continued: “I want you, the voters, to know that I oppose abortion. I support having the Ten Commandments in our schools and courthouses. . . . I support the Second Amendment right to bear arms. . . . I believe marriage is between only one man and one woman. I live a life of traditional western Kentucky values. I think the way you think.”³³ Johnson’s politically-charged

31 Eric Velasco, “Gambling money, false ad claims fly,” *Birmingham News*, October 25, 2006.

32 “Sue Bell Cobb was raised in Evergreen, Alabama. And Sue Bell Cobb’s values, her faith, her family shine brighter every day. She graduated at the top of her class and with honors from law school. And she became Judge Sue Bell Cobb, a pioneer for women judges in Alabama today.”

33 T.R. Goldman, “In Kentucky Supreme Court race, judges get out their soapboxes,” *Legal Times*, November 6, 2006.



campaign was criticized by the state's Judicial Campaign Conduct Committee. Less than a month before the election, the committee issued a news release arguing that "judicial candidates who publicly state their views on disputed issues inevitably create the impression that such views would affect how they would rule from the bench, and that runs counter to the principle of judicial independence."

Cunningham ran traditionally, and took Johnson to task for speaking out, arguing, "It's not just important that our court system be just; it must appear to be just. That's just as important."³⁴ In a television commercial he warned that, "Judicial candidates should not make statements on issues because it creates an agenda and once they have the agenda they become legislative judges."

Kentucky voters elect their Supreme Court by district, and this contest involved voters from the First District seat in conservative western Kentucky. Neither candidate had much of a fundraising edge: Cunningham raised \$208,501 and Johnson raised \$220,973. On election day, First District voters chose Cunningham, the more restrained of the two, 61 to 39.

³⁴ Ibid.

In **North Carolina** the quixotic Supreme Court campaign of Rachel Lea Hunter sought to fully exploit the post-*White* era. Her campaign website featured statements about the Iraq war and opposition to the Central American Free Trade Agreement. She called a black Congressional candidate an "Uncle Tom," and labeled the North Carolina Democratic Party chairman "Der Fuhrer."³⁵ Hunter pulled only 37 percent of the vote against incumbent Justice Mark Martin, who ran a traditional campaign, promoting his legal credentials and experience.

Taken together, these examples seem to contradict the arguments made by proponents of loosening speech codes in judicial elections: that voters are hungering to know the political philosophies of those seeking a place on the bench. Ironically, the message coming from voters seems somewhat the opposite: if you want to campaign like a politician, maybe you should run for the legislature. At least in the short term, American voters seem to be sending a strong message to would-be judges: tell us why you would be a good judge, not about your personal political views.

³⁵ Hunter made national news when she filed a request to be identified on the ballot as "Madame Justice," insisting that it was her nickname. North Carolina election officials rejected Hunter's request, noting that state law stipulated nicknames could only appear on the ballot if they'd been in common use for at least five years. See "North Carolina: 'Madame Justice' loses," *New York Times*, March 28, 2006.

Growing Interest in Reforms to Keep Courts Fair and Impartial

As judges, bar leaders and civic groups have grown alarmed at the rapid growth of the new politics of judicial elections, they have begun banding together to seek solutions that will help insulate courts from special interest and partisan pressures. By exchanging data and ideas, working together to educate the public, and looking for reform opportunities, Justice at Stake partners and allies across the country have begun to fight back.

All systems for choosing judges have strengths and weaknesses, and this report's authors do not endorse any one preferred method. On the one hand, proponents of elections argue that appointive systems often favor the politically-connected elite and that contestable elections maximize democratic accountability. On the other hand, supporters of appointive systems, including merit selection with retention elections, argue that judicial elections have spun out of control and award too much influence to partisans and special interests. The tradeoffs demonstrate the difficulties associated with identifying an "ideal" method of judicial selection.

As campaigns have become more expensive, it has become clearer that it is time for states to show leadership in protecting the fairness and impartiality of their courts—and the processes by which their judges are chosen.

Public Financing of Judicial Campaigns

Many reform groups believe that the best way to rein in exploding campaign costs and keep special interest cash out of the courtroom may come in the form of public financing, so that judges don't have to dial for dollars from the parties who appear before them. Instead, candidates would have to meet public confidence thresholds and agree to abide by strict fundraising limits. Public financing can help mitigate the worst side-effects of high-cost judicial elections, while still leaving the final decision in the hands of the voters.

In 2007 New Mexico became the second state to embrace full public financing of judicial elections. Other states are considering following suit. Legislative leaders in Georgia, Illinois, Michigan, Montana and Washington have put forward their own proposals for public financing of their state's high court elections. In April 2007—following Wisconsin's most expensive judicial election campaign ever—Chief Justice

“(Public financing) makes all the difference. I’ve run in two elections, one with campaign finance reform and one without. I’ll take ‘with’ any day, any time, any where.”

**—Judge Wanda Bryant,
North Carolina Court of Appeals**

Shirley Abrahamson told legislators that “the public’s awareness of the problems of funding judicial campaigns and the public’s perception of possible influence by campaign contributors tends to increase with the amount of money raised and spent.”³⁶

North Carolina was the first state to adopt this innovative approach for judicial elections, and has offered voluntary funding to qualified candidates for its Supreme Court and Court of Appeals since 2004. By virtually any measure, the program has been a success:

- In 2004, 14 of 16 candidates enrolled in the state’s trial run, and in 2006, eight of 12 candidates opted to limit their campaigns’ fundraising in exchange for public funds.
- 99 percent of the money given to candidates for North Carolina Supreme Court in 2006 was donated from in-state sources, and 53 percent of all donations came either in the form of public funds or small contributions of less than \$100. Lawyers—historically the biggest donor of funds to North Carolina Supreme Court candidates—supplied less than 15 percent of the contributions.
- The program has encouraged judicial candidates to collect smaller contributions from more donors (rather than large donations from a few givers), as part of the qualification process. In some cases, candidates turned in hundreds of qualifying contributions above the 350 necessary to enter the program. One candidate reported 830 donors.
- Following its trial run, a 2005 poll conducted for the North Carolina Center for Voter Education by American Viewpoint, a Republican polling firm, found that 74 percent of North Carolina voters approved of continuing the system, while only 18 percent opposed its continuation.

³⁶ Scott Bauer, “Chief justice of Supreme Court urges campaign finance changes,” *Associated Press*, April 10, 2007. Wisconsin has offered partial public financing to Supreme Court candidates since 1976, but the system has suffered from a lack of funding, which comes solely from a taxpayer check-off on the state income tax form.

Defense of Merit Selection

When it comes to fundraising, available data show that systems of merit selection of judges, coupled with retention elections, result in dramatically less expensive campaigns than nonpartisan or partisan contested elections (see chart on page 25).

That's been little disincentive to many partisans and special interests who have pushed to dismantle merit/retention systems in many of the 16 states that use the "Missouri Plan" to choose judges for their highest courts. In recent months and years, legislation to either dismantle or fundamentally alter "Missouri Plan" systems has been introduced in Arizona, Kansas, Indiana, Missouri, Tennessee, and Utah.

Concerned about efforts like these to give interest groups and political partisans more leverage over the courts, organizations who care about fair courts have organized to respond. They've been building coalitions and educating Americans about these efforts, the motivations behind them, and how merit/retention systems are one way to insulate courts from the growing amounts of special interest money being routinely poured into judicial elections across America.


One notable leader in the field has been the Committee for Economic Development (CED), a Washington, D.C.-based nonpartisan organization of business and education leaders. In 2006, Justice at Stake and CED jointly hosted luncheons for local business leaders in Kansas City and Phoenix that featured leaders from the business and legal communities to help them understand how merit/retention systems work and their implications for keeping courts impartial.

The American Judicature Society—established in 1913 to promote the effective administration of justice, and one of the creators of the merits/retention concept—has also been active in defending merit selection. President Neal R. Sonnett published a guest column in which he cited a recent poll about voter attitudes towards Missouri's merit/retention system: "Voters in Missouri know that their state has a high quality court-system that does a remarkably good job of providing fair and impartial justice. . . . 68 percent of voters in the state trust the Missouri Supreme Court to adhere to the letter of the law rather than their own political beliefs. That margin would be considered a landslide in an election."³⁷



Figure 23. Defenders of merit selection (from left to right): Charles Kolb, President of the Committee for Economic Development (CED); retired Justice Sandra Day O'Connor; Mike Petro, Vice President of CED; Chief Justice Ruth McGregor of the Arizona Supreme Court; Pete Dunn, Executive Director of Phoenix-based Justice For All. Photo courtesy of CED.

³⁷ Neal R. Sonnett, "Poll suggests public does not want nonpartisan court plan to change," *Missouri Lawyers Weekly*, March 19, 2007.



State in Focus: Kentucky

In 2006 Kentucky voters faced a daunting judicial election, with every court seat in the state on the ballot, save two members of the state's Supreme Court. The potential for special interest mischief was great. With so many judges on the ballot at one time, defenders of fair and impartial courts organized early to protect candidates from undue pressure and to inform voters about who would be on the ballot.

Justice at Stake and Common Cause of Kentucky teamed up to provide a nonpartisan online voter guide. Every judicial candidate in the state was invited to submit basic information, in their own words, that outlined their biography, their qualifications, and their legal experience (see Figure 24). The information was posted on a specially created website—KYJUDGES.COM—and publicized using televised Public Service Announcements and through outreach to local media. In the days before the primary and general elections, the voter guide website received more than 38,500 hits.

“The public deserves a dignified judiciary, and that requires dignified campaigning.”

—Kentucky Judicial Campaign Conduct Committee

Legal and civic leaders also established a Judicial Campaign Conduct Committee to help candidates and voters navigate this historic Kentucky election. Lexington attorney Spencer Noe chaired the group, which included distinguished professors, retired reporters, and others who worked together to, in the words of the committee, “educate voters and candidates that the state’s nonpartisan judicial elections are not like other elections, and should be viewed differently.”³⁸

³⁸ News release of the Kentucky Judicial Campaign Conduct Committee, April 8, 2006. See <http://www.loubar.org/JCCC/KJCCHome.htm>.

A May 2006 poll for Justice at Stake found that 79 percent of Kentucky voters agreed with the statement: "Before going to vote for judge, I would benefit from having a nonpartisan voter's guide that gives me information and statements directly from judicial candidates."

When the votes were counted, the 2006 campaigns were not nearly as negative or costly as many had feared. Candidate fundraising set a state record, but interest groups and partisans largely remained on the sidelines. Most television ads in the state's four Supreme Court contests focused on credentials and experience—89 percent were positive—and not a single ad was aired by a special interest group. The Kentucky experience shows how those who care about impartial courts can take steps before problems get out of hand in their state.

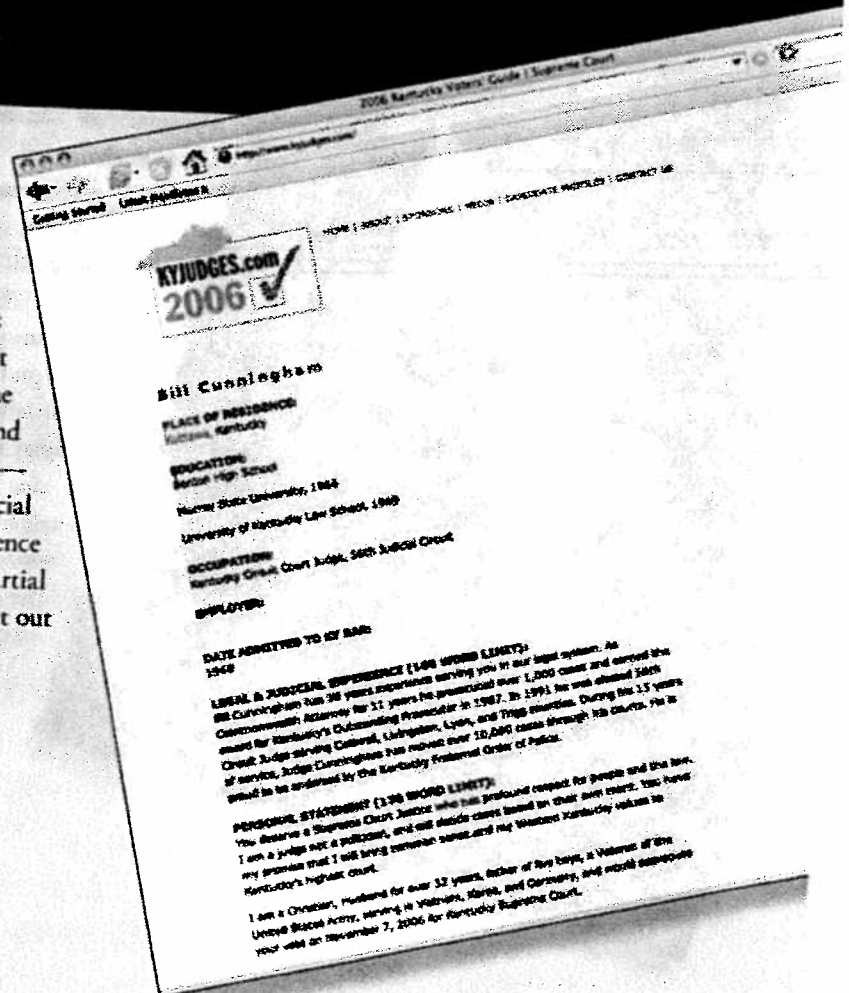


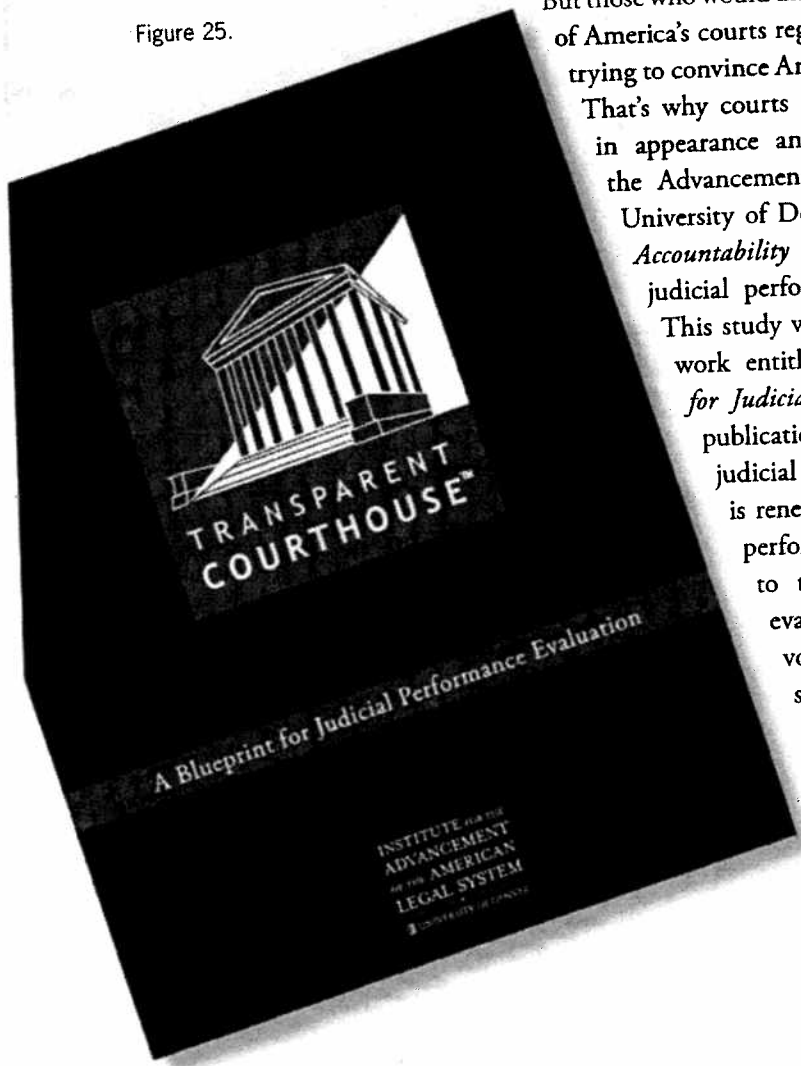
Figure 24.

Judicial Performance Measures: Defining Proper Judicial Accountability

In recent years, partisans and special interests have attempted to gain political advantage by demanding that judges need to be more accountable. Of course, judges must be accountable, but not to politicians or single-issue groups. Accountability properly defined in the judicial context means faithful adherence to the law and the Constitution. Judicial decisions are subject to appeal. Judges routinely lay out the reasoning behind court decisions in writing. State and federal courts have disciplinary processes to deal with judges that cross ethical boundaries.

Figure 25.

But those who would undermine the independence and impartiality of America's courts regularly distort the notion of accountability, trying to convince Americans that their courts are out of control. That's why courts have to do even more to be accountable, in appearance and in reality. In 2006, the Institute for the Advancement of the American Legal System at the University of Denver released *Shared Expectations: Judicial Accountability in Context*, a comprehensive survey of judicial performance evaluation standards in America. This study was followed by the release of a companion work entitled, *Transparent Courthouse™: A Blueprint for Judicial Performance Evaluation*. Together, these publications provide the tools to establish or improve judicial performance standards and metrics. There is renewed interest around the country in judicial performance evaluation. If voters have access to the output of a comprehensive and fair evaluation process, everyone wins. And when voters better understand their judges' records, special interests will have less clout to distort them.³⁹



³⁹ For more discussion on the value in widely disseminating such evaluations, see Institute for the Advancement of the American Legal System, "Transparent Courthouse: A Blueprint for Judicial Performance Evaluation," p. 10.

Moving Towards Merit Selection

Paradoxically, Minnesota—the state that was sued in the *White* case—is one of only two states with contestable elections that has not seen a broadcast television ad in a Supreme Court campaign. Minnesota also ranks near the bottom in total fundraising by high court candidates since 2000.

That has not stopped legal and political leaders from across Minnesota from resting on the status quo. They have recognized that they are not immune from national trends and in 2006 turned to former Governor Al Quie to lead a policy review commission examining how to protect Minnesota's courts from the looming specter of special interest politics. In early 2007, the "Quie Commission" released a report suggesting the state move to a modified "Missouri Plan" system of merit selection with retention elections, and suggested incorporating a sophisticated and transparent judicial performance review mechanism to maximize judicial accountability.

The proposals will be considered by the Minnesota legislature in late 2007 or early 2008. If they are approved, Minnesota voters could be asked in November of 2008 to endorse a constitutional amendment.

An April 2007 poll for the Committee for Economic Development found that 90 percent of the business leaders surveyed were concerned that campaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.

Stronger Recusal Standards

In order to reduce the potential link between interest group pressure and case decisions, many observers believe that the time has come for judges to recuse themselves from at least some cases where contributors argue before them in court—or when campaign trail speech calls their partiality into question.⁴⁰ The American Bar Association's Model Code of Judicial Conduct, adopted by every state in some form, stipulates that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."⁴¹

But judges have declined to disqualify themselves or their peers because of campaign contributions. Most recently, in 2005 the U.S. Supreme Court refused to force Illinois Supreme Court Justice Lloyd Karmeier to sit out a lawsuit against State Farm despite receiving more than \$350,000 in campaign contributions just a few months before from the company's employees and lawyers (and others involved with the company or the case, including attorneys for amici). And in the post-*White* world, more outspoken judicial campaign rhetoric, whether or not in response to high-pressure questionnaires, is also leading to greater consideration of recusal.

Recusal reform is not simple or easy. But if the new politics of judicial elections are going to give special interests and their campaign cash a permanent seat in the courtroom, then the time has come for courts to rethink their reluctance to invoke recusal. Possible reforms include allowing parties to disqualify a judge once per case for any reason, requiring judges to disclose more about potential conflicts, requiring disqualification after contributions to a judge pass a certain threshold, requiring that recusal motions be decided by an independent judge, requiring that judges always explain the basis of their recusal decisions, giving appellate courts more latitude to require recusal, better educating judges on the need to avoid even the appearance of partiality, or even permitting advisory bodies to provide guidance on difficult recusal questions.⁴²

In particular, the time is ripe for states to consider adopting some version of an ABA model provision that could lead to disqualification when campaign contributions exceed a certain limit.⁴³ In terms of campaign speech, courts would do well to look

⁴⁰ For purposes of this discussion, recusal and disqualification are used interchangeably.

⁴¹ ABA Model Code Of Judicial Conduct, Canon 3E (2004)

⁴² Deborah Goldberg, James Sample, and David E. Pozen, "The Best Defense: Why Elected Courts Should Lead Recusal Reform," *Washburn Law Review* __ (2007).

⁴³ ABA Model Code Of Judicial Conduct, Canon 3E(1)(E): when "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[\$] for an individual or [\$] for an entity]] [[is reasonable and appropriate for an individual or an entity]]." The model code assumes that states will fill in the blanks with numbers appropriate to their political situation.

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Campaign Cash Mirrors a High Court's Rulings

By ADAM LIPTAK
and JANET ROBERTS

COLUMBUS, Ohio — In the fall of 2004, Terrence O'Donnell, an affable judge with the placid good looks of a small-market news anchor, was running hard to keep his seat on the Ohio Supreme Court. He was also considering two important class-action lawsuits that had been argued many months before.

In the weeks before the election, Justice O'Donnell's campaign accepted thousands of dollars from the political action committees of three companies that were defendants in the suits. Two of the cases dealt with defective cars, and one involved a toxic substance. Weeks after winning his race, Justice O'Donnell joined majorities that handed the three companies significant victories.

Justice O'Donnell's conduct was unexceptional. In one of the cases,

TILTING THE SCALES? The Ohio Experience

every justice in the 4-to-3 majority had taken money from affiliates of the companies. None of the dissenters had done so, but they had accepted contributions from lawyers for the plaintiffs.

Thirty-nine states elect judges, and 30 states are holding elections for seats on their highest courts this year. Spending in these races is skyrocketing, with some judges raising \$2 million or more for a single campaign. As the amounts rise, questions about whether money is polluting the independence of the judiciary are being fiercely debated across the nation. And nowhere is the battle for judicial seats more ferocious than in Ohio.

An examination of the Ohio Supreme Court by The New York

Times found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time. Justice O'Donnell voted for his contributors 91 percent of the time, the highest rate of any justice on the court.

In the 12 years that were studied, the justices almost never disqualified themselves from hearing their contributors' cases. In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.

Even sitting justices have started to question the current system. "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race," said Justice Paul E.

Continued on Page 22

Ruined Towns Look to Beirut Mostly in Vai.

By MICHAEL SLACKMAN

BEIRUT, Lebanon, Sept. 30 — A

at what the Missouri Supreme Court ordered in response to *White*: "Recusal, or other remedial election, may nonetheless be required of a judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct."⁴⁴ The Missouri rule allows judges to resist special interest pressure by telling them 'if I say what you want me to, I won't be able to sit on the cases that you care about most.' Recusal deserves further study, but the time for new thinking—and new action—has come. Complexity cannot be an excuse for passivity.

Figure 26.
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44 In re Enforcement of Rule 2.03, Canon 5.B(1)(c), July 18, 2002.

Voters Reject Political Tampering With Courts

The 2006 elections saw partisans, ideologues, and special interests using ballot measures to build on their growing influence in judicial elections. In five states, voters were urged to amend their constitutions in order to alter the composition or functioning of state courts. In each case, the explicit goal was to manipulate the courts for political or partisan ends.

They included:

Colorado—Mandate retroactive term limits on appellate judges

Hawaii—Lift mandatory retirement age to deny governor new appointments

Montana—Enable recall of judges for any reason

Oregon—Create districts for appellate court elections

South Dakota—Repeal judicial immunity (“J.A.I.L. 4 Judges”)

With nearly a half dozen measures on the ballot, would-be populist rage seemed ready to undermine impartial courts. In October, an article on *Newsweek*’s website dubbed these efforts “Get the Judges,”⁴⁵ while a *Los Angeles Times* story was headlined “Call of the West: Rein in the Judges.”⁴⁶ The implication was that voters were “mad as hell” with judges and they weren’t going to take it any more.

But constitutional values trumped these angry slogans. When the votes were counted, not a single one of the anti-court measures passed. In fact, each failed by at least 10 percentage points. The across-the-board defeats indicate that partisans and interest groups can be successful at motivating base constituencies, and perhaps attracting some high-profile media attention, but that when both sides of the argument get heard, political demands to “rein in the judges” have limited mainstream appeal.⁴⁷ As they did in the Terri Schiavo episode, most Americans will reject political tampering with the courts if it is called to their attention.

⁴⁵ Andrew Murr, “Get the judges,” *Newsweek.com*, October 24, 2006.

⁴⁶ Stephanie Simon, “Call of the west: Rein in the judges,” *Los Angeles Times*, October 15, 2006.

⁴⁷ Matt Apuzzo, “Fight against ‘judicial activism’ to continue despite U.S. election setbacks,” *Associated Press*, November 10, 2006.

Colorado: Retroactive Term Limits

Amendment 40 proposed to:

1. Limit the number of terms that appellate court judges could serve
2. Reduce term lengths for appellate judges from ten to four years
3. Require appellate judges who have already served ten years to retire⁴⁸
4. Require those not forced into retirement to stand for a retention election in November 2008

Signatures Needed: 67,829

Signatures Submitted: 79,389⁴⁹

	Yes	No
Votes:	43%	57%
Fundraising:	\$1,243,408	\$1,281,599

Many in the state's legal and civic community began 2006 with elaborate plans to celebrate the 40th anniversary of Colorado's adoption of a merit selection system for choosing its judges. By the middle of the year, those same groups found themselves in a defensive posture facing an insurgent campaign that would have thrown the judiciary into turmoil by imposing **retroactive** term limits on the state's two highest courts. If the amendment had passed, five of the seven members of the state Supreme Court and nine of 12 members of the Court of Appeals would have been fired.

The lead in-state proponent of the measure, John Andrews, was a former state senator who had been a vocal critic of many recent rulings by the state Supreme Court. Andrews began the effort from a position of power: by mid-summer, polling showed Colorado voters favoring term limits for judges;⁵⁰ New York millionaire Howard Rich promised to open up his checkbook;⁵¹ and the *Wall Street Journal* gave Andrews space on its op-ed page to make his case.⁵² Andrews formed a LIMIT THE JUDGES political

⁴⁸ Under Colorado law, judges can serve an unlimited number of terms, but face mandatory retirement at age 72.

⁴⁹ Proponents submitted 109,426 signatures. The Colorado Secretary of State analyzed a five percent random sample, and estimated on that basis that 79,389 valid signatures were submitted.

⁵⁰ Paul Chan, "Vote No 40 Recap," *The Docket* (Denver Bar Association), December 2006.

⁵¹ According to disclosure records, 98 percent of the funding for the "yes" campaign came from a political committee named COLORADO AT ITS BEST, believed to be associated with Rich. See Peter Schrag, "Rich's stealth campaign," *The Nation*, November 6, 2006.

⁵² John Andrews, "Ten years and out," *Wall Street Journal*, August 10, 2006.

... Our State Supreme Court ignored years of legal precedent and decided that the public should not have a say in one of the most important policy debates of our time. The Court's decision was inconsistent, inappropriate, believe, arrogant."

Limit The Judges
1410 Grant St., Ste. B-305
Denver, CO 80203

PRST
US PS
PAI
PD MA

THE DENVER POST

JUNE 13, 2006

Voice of the Rocky Mountain Empire

Court bars immigration vote

Colo. justices keep initiative off ballot; services for illegal immigrants would be cut

"This is outrageous judicial activism...it's raw naked politics."

Former Colorado Governor Dick Lamm
Denver Post, June 13, 2006

"Term limits are working for Colorado. Amendment 40 expands term limits to cover all three branches of government. For better courts, vote YES on Amendment 40."
Ken Buck
Colorado District Attorney
Judicial District 19

Colorado's courts are out of control. Judges too often create law, instead of upholding it. This November, Colorado voters have an opportunity to rein in activist judges and take back our courts.

Support Judicial Term Limits
**Vote Yes on
Amendment 40**

committee and issued mailers with statements like "Colorado's courts are out of control. Judges too often create law, instead of upholding it."

Figure 27.

Opponents marshaled a political coalition of more than a hundred groups. Three retired governors joined outgoing Governor Bill Owens in publicly opposing the amendment. Detractors ran the campaign on a simple message: the amendment was a bad idea that would have serious consequences for the people of the state by slowing down the justice system and limiting access to justice. The No on Amendment 40 committee received a majority of its campaign budget from the COLORADO BAR ASSOCIATION (\$574,057) and the DENVER BAR ASSOCIATION (\$100,000). But opposition to the measure was not confined to the legal establishment. The U.S. CHAMBER OF COMMERCE gave \$50,000 to the "No" campaign; QWEST COMMUNICATIONS gave \$25,000; and DRI: THE VOICE OF THE DEFENSE BAR gave \$10,000.

Hawaii: Lift Mandatory Retirement Age of Judges

Measure 3 would have repealed the mandatory retirement age of 70 for state judges.

	Yes	No
Votes:	43%	57%
Fundraising:	None Reported	None Reported

Supporters in the Democratic controlled legislature argued that Hawaii's mandatory retirement age forced some of the state's best legal minds into unnecessary retirement. Opponents questioned the timing of the amendment, noting that if Republican Governor Linda Lingle was re-elected (as she indeed was), she would be denied the opportunity to make a number of new appointments to the state's courts.⁵³ The Hawaii Bar Association took an official position in opposition to the measure, which failed by 14 points on election day.

⁵³ David Shapiro, "Isle lawyers facing controversial decision," *Honolulu Advertiser*, August 2, 2006.

Montana: Judicial Recall For Any Reason

Constitutional Initiative 98 proposed subjecting all judges to recall elections.

Signatures Needed: 44,615

Signatures Submitted: 51,706

	Yes	No
Votes:	Ballots not counted. ⁵⁴	
Fundraising:	None Reported	None Reported

A group called MONTANANS IN ACTION led the campaign in support of this measure, dubbed "Citizens Right to Recall." Montana law already allows voters to recall judges for lack of physical or mental fitness, incompetence, violation of the oath of office, official misconduct, or felony conviction. And every judge in the state must already stand for election. But backers of this amendment wanted power to remove judges for individual decisions with which they disagreed.

Important money and support came from AMERICANS FOR LIMITED GOVERNMENT, which listed MONTANANS IN ACTION as a "partner" on its website and supported like-minded initiatives around the country. In-state sources report that the cost of the signature-gathering drive may have exceeded \$700,000.

⁵⁴ Votes for this amendment were never counted, because the state courts found that MONTANANS IN ACTION's paid signature gatherers had engaged in widespread fraud. See Mike Dennison, "Signature gatherers pushing for spending cap accused of deception," *Helena Independent Record*, June 2, 2006.



Oregon: Judicial Districts for Appellate Courts

Constitutional Amendment 40 proposed replacing contested statewide elections for Supreme Court and Court of Appeals with a district-based system.

Signatures Needed: 100,840

Signatures Submitted: 102,637⁵⁵

	Yes	No
Votes:	44%	56%
Fundraising:	\$544,605	\$425,965

Since 1931, all of Oregon's appellate judges have been elected in nonpartisan, statewide elections. In 2002, interest groups seeking to oust what they viewed as liberal, Portland-area judges placed a measure on the ballot to mandate election to the appellate courts by geographic district. The measure failed by the slimmest of margins. Constitutional Amendment 40 of 2006 was a near-replica of the 2002 measure. It very narrowly made the ballot, eclipsing the minimum signature requirement by less than two percent, and this time met with a significant defeat on election day.

The measure received substantial financial support from the OREGON FAMILY FARM ASSOCIATION, which contributed \$522,928 of the \$544,605 budget.⁵⁶ A group called the JUDICIAL INTEGRITY COALITION contributed over \$20,000. The Coalition listed its treasurer as Russ Walker, who is the former director of the Oregon chapter of CITIZENS FOR A SOUND ECONOMY, a conservative interest group allied with the Washington, DC-based FREEDOMWORKS. FREEDOMWORKS and its allies in the states advocate "lower taxes, less government and more economic freedom for all Americans."

⁵⁵ Proponents submitted 156,016 signatures, of which 111,402 were valid signatures. The total was further reduced by the inclusion of 8,765 duplicates.

⁵⁶ The OUR COURTS COMMITTEE—which backed Constitutional Amendment 40—raised its entire budget from four donors. Besides the two donors listed in this paragraph, the group received \$1,316 from OREGONIANS IN ACTION and \$100 from an individual contributor.

Opponents organized a political committee called NO ON CONSTITUTIONAL AMENDMENT 40. The opponents argued that adopting the measure would actually bring more politics into how judges reached the bench in Oregon, and empower special interest groups to target judges over single decisions. In one of their radio ads they said: "Constitutional Amendment 40 is a major and unnecessary change to Oregon's constitution. . . judges would be elected based on where they lived instead of purely on their qualifications." Most of the state's newspapers came out against the constitutional amendment. The biggest donor to the opposition was the OREGON EDUCATION ASSOCIATION, which contributed \$50,000.

“Constitutional Amendment 40 is a major and unnecessary change to Oregon's constitution. . . judges would be elected based on where they lived instead of purely on their qualifications.”

—No on Constitutional Amendment 40 radio ad

South Dakota: "J.A.I.L. 4 Judges"

Amendment E proposed to:

1. Strip judicial immunity for anyone holding public office with judicial or quasi-judicial decision-making responsibilities
2. Establish a "special grand jury" of 13 to hear complaints against judges
3. Under certain conditions, remove judges from office, and strip judges of half their pensions

Signatures Needed: 33,456

Signatures Certified: 46,800⁵⁷

	Yes	No
Votes:	11%	89%
Fundraising:	\$225,626	\$1,099,049

J.A.I.L. 4 JUDGES'S advocates are a disparate national network of tax protesters, conspiracy theorists, jury nullification supporters, and others with grievances against the courts and other features of modern government. Its website claims 50 state chapters, whose leaders claim the rank of "Major General" or "J.A.I.L. er in Chief." The Alaska leader has been known to parade around in black robes, with a noose around his neck and scaffolding above his head, before shedding the robes and burning them. J.A.I.L.'s supporters have picketed the homes of offending judges and generated email campaigns—sometimes laced with electronic viruses and worms—against the Anti-Defamation League, reporters and legislators over statements that upset them.

The Judicial Accountability Initiative Law (J.A.I.L.) movement was started by a Californian named Ronald Branson, who has a history of suing state and federal officials for alleged conspiracies (including his own trials for burglary and a traffic offense). After being rebuffed by the courts—including the U.S. Supreme Court on 14 separate occasions, even to appeal a parking ticket—and attorneys general and legislatures in Sacramento and Washington, D.C., Branson developed the idea of a J.A.I.L. ballot initiative.

⁵⁷ Proponents of the J.A.I.L. 4 JUDGES measure submitted 46,800 signatures. The South Dakota Secretary of State's office certified the measure for the ballot when it had verified the minimum number of signatures needed for ballot access. An analysis after the election found thousands of fake signatures, prompting the South Dakota legislature to consider a law banning payment to contractors working on a per-signature basis. See "Bill would create law on collecting signatures," Sioux Falls (SD) *Argus Leader*, January 31, 2007.

Figure 28.



Branson failed three times to get enough signatures to put the measure on the California ballot. Signature gathering efforts in Florida, Idaho, and Nevada also proved futile.

But South Dakota's signature requirement was much lower. A South Dakotan, Bill Stegmeier, reportedly mortgaged his home to pay a firm to gather signatures. South Dakotans were urged to sign if they were mad about *Roe v. Wade* or the U.S. Supreme Court's 2005 *Kelo* decision upholding local eminent domain powers—or if they just wanted to hold judges accountable. J.A.I.L. supporters believed they were

Who's fighting Amendment E? People you know.

Cities in Opposition

Aberdeen	Colton	Hermosa	Montrose	Tulsa
Alpena	Dallas	Herrick	No. Sioux City	Waga
Arlington	Dell Rapids	Howard	Onida	Wagner
Ashlon	De Smet	Huron	Philip	Walt
Aurora	Elk Point	Java	Pierre	Warner
Beresford	Estelline	Kennebec	Plankinton	Watertown
Big Stone City	Eureka	Lake Norden	Platte	Webster
Blunt	Faulton	Lake Preston	Rapid City	Westport
Branden	Flandreau	Lennox	Raymond	White
Brookings	Florence	Letcher	Roscoe	Willow Lake
Bryant	Fort Pierre	Marion	Salem	Wolsey
Camp Crook	Frederick	Martin	Sioux Falls	Woonsocket
Canistota	Garnett	McLaughlin	Sisseton	Yankton
Castlewold	Gary	Menno	Spearfish	
Chancellor	Geddes	Millbank	St. Lawrence	
Clear Lake	Hartford	Mitchell	Summerset	
Colman	Hazel	Monroe	Timber Lake	

Counties in Opposition

Aurora	Custer	Hanson	Marshall	Sanborn
Beadle	Day	Harding	McCook	Spink
Bennett	DeWitt	Hughes	McPherson	Stanley
Bon Homme	Dewey	Hyde	Meade	Sully
Brown	Douglas	Jackson	Mellette	Turner
Brule	Edmunds	Jerauld	Miner	Union
Campbell	Fall River	Jones	Minnehaha	Wahpet
Clark	Faulk	Kingsbury	Pennington	Yankton
Clay	Grant	Lawrence	Perkins	Ziebach
Codington	Gregory	Lincoln	Potter	
Corson	Ham	Lyman	Roberts	

School Boards in Opposition

Agar-Blunt-Orinda	Herrid	Millbank	Sioux Falls
Aven	Hoven	Mitchell	Spearfish
Belle Fourche	Huron	New Underwood	Todd County
Bon Homme	Inyoquois	Parker	Warner
Conde	Isabel	Pollock	Waverly
Edgemont	Lead-Deadwood	Polo	White Lake
Frederick Area	Lemmon	Rapid City Area	Willow Lake
Grant-Deuel	Lennox	Redfield	Winnifred
Haakon County	Madison Central	Reshold	
Harold	McLaughlin	Selby Area	

Organizations in Opposition

Associated School Boards of SD	SD Auto Dealers' Assoc.	SD Livestock Auction Markets Assoc.
National Federation of Independent Business - SD Chapter	SD Bankers' Assoc.	SD MANstream Coalition
Sioux Falls Area Chamber of Commerce	SD Broadcasters' Assoc.	SD Manufactured Housing Assoc.
SD AFL-CIO	SD CPA Society	SD Municipal League
SD Ag Unity	SD Chamber of Commerce	SD Petroleum and Propane Marketers' Assoc.
SD Agribusiness Assoc.	SD Chiefs of Police	SD Pork Producers
SD Assoc. of Cooperatives	SD Coalition for Responsible Taxation	SD Retailers Assoc.
SD Assoc. of County Officials	SD County Commissioners	SD Sheriffs' Assoc.
SD Assoc. of Health Care Organizations	SD Electric Utilities Assoc.	SD State Bar
SD Assoc. of Mutual Insurers	SD Family Policy Council	SD State's Attorneys' Assoc.
SD Assoc. of Realtors	SD Funeral Directors' Assoc.	SD Truckers' Assoc.
SD Assoc. of Specialty Care Providers	SD Independent Insurance Agents	
	SD Insurance Alliance	
	SD Land Title Assoc.	

no-on-e.com

NO on E
Amendment

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gathering momentum. "The People are slowly waking up to realize who the Enemy is—and it isn't Bin Laden," wrote Branson's wife.⁵⁸

In response, an extremely broad coalition of political parties, business leaders and the civic sector came together to oppose J.A.I.L. The state legislature unanimously passed a resolution noting that judges are already adequately disciplined for misconduct and warning South Dakotans that the measure would cost taxpayers millions and lead to an epidemic of frivolous actions, including suits by convicted felons against judges and prosecutors who put them behind bars. J.A.I.L. 4 JUDGES demanded a retraction, threatening to sue and arrest all 105 legislators.

Opponents hammered the amendment's vague language, arguing over and over that other public servants—including county commissioners and even jurors—would be vulnerable to lawsuits if J.A.I.L. passed. They traveled the state collecting statements of opposition from town councils and respected local officials. Business leaders in South Dakota and around the nation responded to warnings that J.A.I.L. could disrupt the kind of stable judiciary needed to enforce contracts. Two of the state's leading bloggers—one liberal and one conservative—joined forces to create a "No on Amendment E" blog that relentlessly tormented J.A.I.L.'s backers.

"We're going to kill them dead here so no other state has to go through what we're going through," predicted anti-J.A.I.L. campaign coordinator Tom Barnett.⁵⁹ After the measure's crushing defeat, J.A.I.L. supporters urged that "South Dakota voters file criminal affidavits with the U.S. Attorney and FBI that they were victims of a fraudulent election."⁶⁰

Figure 29.

⁵⁸ <http://groups.yahoo.com/group/jail4judges/message/490>

⁵⁹ Wendy Davis, "Getting out the 'no' vote," *ABA Journal*, November 2006, pp. 14-15.

⁶⁰ Peter Lattman, "South Dakota's 'J.A.I.L. 4 Judges' measure fails," *Wall Street Journal Law Blog*, November 8, 2006.

Appendix

Supreme Court Candidate Fundraising Summary by State, 1999-2006

1999-2006 Retention Elections

State	Year	Candidates	Total
AK	2000	3	\$70,700
	2002	1	\$0
AZ	2000	3	\$0
	2004	3	\$0
	2006	2	\$0
	2006	2	\$0
CA	2002	3	\$225,298
	2006	2	\$0
CO	2000	4	\$0
	2002	1	\$0
FL	2000	3	\$7,500
	2004	2	\$0
	2006	3	\$0
IA	2000	2	\$0
	2002	2	\$0
	2004	3	\$0
IL	2000	1	\$224,460
	2002	1	\$0
IN	2002	1	\$0
	2006	1	\$0
KS	2000	2	\$0
	2004	4	\$0
	2006	1	\$0
MD	2000	1	\$0
	2002	3	\$0
	2006	2	\$0
MO	2000	1	\$0
	2002	1	\$0
	2004	1	\$0
	2006	3	\$0
MT	2002	1	\$34,375
	2004	1	\$26,028
	2006	2	\$53,083
NE	2000	2	\$0
	2002	3	\$0
	2004	3	\$0
	2006	2	\$0

NM	2000	1	\$0
	2002	2	\$0
	2004	1	\$0
	2006	1	\$1,076
OK	2000	4	\$0
	2002	4	\$0
	2004	2	\$0
	2006	5	\$0
PA	1999	2	\$0
	2001	1	\$0
	2003	1	\$0
	2005	2	\$944,727
SD	2006	5	\$0
TN	2006	3	\$0
UT	2004	3	\$0
	2006	2	\$0
WY	2000	1	\$0
	2002	2	\$0
	2004	1	\$0
	2006	2	\$0
Total			\$1,587,247

1999-2006 Contestable Elections

State	Year	Candidates	Total
AL	2000	13	\$12,337,334
	2002	4	\$2,922,131
	2004	11	\$7,688,110
	2006	15	\$13,413,978
AR	2000	5	\$411,705
	2002	1	\$16,921
	2004	5	\$976,795
	2006	6	\$431,863
GA	2000	3	\$38,888
	2002	7	\$717,777
	2004	2	\$815,531
	2006	5	\$1,793,612
ID	2000	2	\$298,546
	2002	3	\$76,909
	2004	2	\$8,550
	2006	1	\$0
IL	2000	11	\$7,990,295
	2002	3	\$1,986,304
	2004	2	\$9,364,559
KY	2000	2	\$389,834
	2002	1	\$0
	2004	2	\$478,633
	2006	10	\$2,119,871
LA	2000	1	\$125,978
	2001	4	\$2,740,455
	2002	1	\$130,105
	2004	2	\$904,148
	2006	2	\$0
MI	2000	9	\$6,735,903
	2002	7	\$964,887
	2004	5	\$1,491,199
	2006	5	\$1,072,527
MN	2000	8	\$528,703
	2002	3	\$91,825
	2004	4	\$120,205
	2006	1	\$200
MS	2000	10	\$3,418,551
	2002	3	\$1,816,014
	2004	11	\$2,563,084
MT	2000	6	\$1,144,832
	2002	2	\$97,209
	2004	4	\$845,594
	2006	2	\$53,083

NC	2000	5	\$2,049,335
	2002	6	\$807,320
	2004	10	\$1,267,354
	2006	11	\$2,736,040
ND	2000	2	\$15,925
	2002	1	\$0
	2004	1	\$0
	2006	1	\$0
NM	2002	2	\$91,031
	2004	2	\$466,697
	2006	2	\$0
NV	2000	5	\$563,179
	2002	3	\$773,583
	2004	10	\$3,086,378
OH	2000	5	\$3,334,831
	2002	4	\$6,233,348
	2004	8	\$6,304,022
	2006	6	\$2,805,994
OR	2000	7	\$655,203
	2002	1	\$43,259
	2004	5	\$305,712
	2006	5	\$1,411,346
PA	2001	2	\$2,273,866
	2003	6	\$3,340,872
TX	2000	9	\$1,711,126
	2002	17	\$6,766,256
	2004	5	\$2,003,812
	2006	12	\$3,505,285
WA	2000	13	\$953,484
	2002	9	\$804,454
	2004	14	\$1,348,689
	2006	9	\$1,810,993
WI	1999	2	\$1,312,402
	2000	2	\$430,511
	2001	1	\$24,750
	2003	4	\$745,626
	2005	1	\$40,380
WV	2000	5	\$1,264,779
	2004	4	\$2,772,555
Total			\$155,417,423
Grand Total:			\$157,004,670



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